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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE

No.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these cases on August 3, 1971.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–47a) is not yet officially reported. The opinions of the Federal Communications Commission are reported at 25 F.C.C. 2d 242 and 25 F.C.C. 2d 216 (Apps. B and C, *infra*, pp. 48a–90a and 91a–154a).

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1971, and reissued on October 29, 1971 (App. D, *infra*, pp. 155a–156a). A timely petition for rehearing and suggestion for rehearing *en banc*, was denied by the court on October 4, 1971 (App. E, *infra*, pp. 157a–158a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the powers granted to it by the Federal Communications Act, and in light of the inherent limitations on the broadcast spectrum, the Federal Communications Commission, which under its "Fairness Doctrine" requires broadcast licensees to originate programs involving controversial issues of public importance, must, because of the First Amendment, also require that the licensees sell time to individuals and groups for the advertising of their particular views.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

Section 3(h) of the Communications Act of 1934, 48 Stat. 1064, *et seq.*, as amended, 47 U.S.C. 153(h), provides:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 73 Stat. 557, 47 U.S.C. 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to

political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

These cases arise out of two orders of the Federal Communications Commission, concerning claims that radio and television broadcasters cannot refuse to sell any broadcast time for the discussion of controversial issues. In each instance the complainant sought time to present its own views, without regard to whether the station licensee had otherwise fulfilled its affirmative and continuing obligation under the Commission's fairness doctrine to inform the public on questions of public importance by presenting representative and contrasting views.

In *Business Executives' Move for Vietnam Peace* (BEM), a national organization sought to purchase time for one-minute anti-Vietnam War announcements on radio station WTOP, Washington, D.C. The station declined to sell the time on the ground that it was against its policy to sell spot time for the discussion of controversial issues. It explained that such subjects "require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement" (App. C, p.

92a). Moreover, it claimed before the Commission that it had carried, through a variety of spokesmen in different formats, the views of both proponents and opponents of the war, including the views embodied in the proposed BEM announcements (App. C, pp. 94a–95a).

In *Democratic National Committee* (DNC), that organization sought a declaratory ruling that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues" (App. B, p. 48a). DNC did not request relief against any particular station.

The Commission ruled on the two matters in related opinions issued on the same day. With respect to WTOP's claim that it had given substantial coverage to various opinions on the war, the Commission noted that this had been challenged by "no more than a general allegation" to the contrary, and held that this was an insufficient basis upon which to require WTOP to undertake a burdensome demonstration of its compliance with the fairness doctrine (App. C, pp. 97a–99a). It rejected the two complainants' common contention that, for constitutional and other reasons, time must be sold to groups seeking to air their particular views about controversial public issues.

The Commission held that such a requirement would be inconsistent with its fairness doctrine and is not mandated by the First Amendment or by the system of private broadcasting established by Congress.[1] It

[1] In *Business Executives' Move for Vietnam Peace*, the Commission relied primarily on its basic and more extensive analysis in *Democratic National Committee* (App. C, pp. 101a–102a).

pointed out that Congress expressly chose not to make a broadcaster a common carrier (47 U.S.C. 153(h)) and had instead approved (47 U.S.C. 315(a)) the Commission's policy known as the fairness doctrine, under which licensees are regarded as trustees of the public interest charged with an affirmative responsibility of informing the public about representative community views on issues of great public importance (App. B, pp. 62a–65a). Emphasizing the Court's endorsement of this doctrine in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission,* 395 U.S. 367, the Commission stated that this responsibility necessarily vests in each licensee a broad discretion to determine the issues to be discussed, the spokesmen that will speak, and the format to be used (App. B, pp. 58a–65a).

The Commission concluded that the paramount First Amendment right of the public to be informed, recognized by the fairness doctrine and in *Red Lion* (395 U.S. at 390), is best served by continued reliance on licensee discretion rather than by conferring upon members of the public qualified rights of access to a communications medium which inherently is not available to all (App. B, pp. 64a–72a). In the Commission's view, the alternative would pose difficult problems for licensees in maintaining a balanced facility for the discussion of public issues, would give persons with substantial financial resources undue influence in the determination of the use of that facility, and would endanger the principle that free time must be provided, if necessary, to redress an

imbalance in coverage[2] (App. B, pp. 65a–67a). The Commission cautioned broadcast licensees, however, that a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open,'" citing, *inter alia*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (App. B, p. 61a).[3]

Upon petitions for review filed by BEM and DNC pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), the court of appeals, with Judge McGowan dissenting, reversed. The court held that "a flat ban [by licensed broadcasters] on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted" (App. A, p. 3a). Although recognizing that the physical limitations of broadcast time necessarily restrict access to the airwaves, the court concluded that within these limitations there is nevertheless "a reasonably regulated, 'abridgeable' right to speak" (App. A, p. 22a). This abridgeable interest, in the court's view, derives from the public's right to receive ideas and information (App. A, p. 20a), the public's "First Amendment interest in the

[2] See *Cullman Broadcasting Co., Inc.*, 40 F.C.C. 576.

[3] The Commission also ruled that time should be made available for sale to significant political parties to solicit funds, in view of the importance of viable parties and the fact that the *Cullman* principle, *supra*, n. 2, is not applicable to the political party areas (App. B, pp. 72a–75a). See *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707.

mode or manner—as well as the content—of public debate aired on the broadcast media" (App. A, p. 21a), and "the interest of individuals and groups in effective self-expression" (App. A, p. 22a). Since editorial advertising involves some initiation and control of the broadcast by the advertiser, it directly serves the First Amendment interest in wide-open debate and self-expression; by contrast, the court deemed exclusive control by licensees over the initiation and editing of broadcasts on controversial issues to be "inimical to the First Amendment" (App. A, p. 24a). For this reason, the Commission's reliance on the duty of licensees to originate such broadcasts, subject to the fairness doctrine, was held to be constitutionally insufficient (App. A, p. 24a, n. 34). Moreover, the court held that if commercial advertising is sold at all, a total ban against editorial advertising by broadcasters violates the First Amendment because such a ban discriminates against controversial speech in favor of commercial speech (App. A, 29a–36a).

The court found unpersuasive the fears of the Commission and the broadcasters that only those with the greatest wealth would be able to purchase time and thereby enjoy the "abridgeable" right of access; that licensees might lose control of their programming; and that the fairness doctrine's requirement that contrasting views to editorial advertising be presented free of charge (if necessary) might seriously impair the financial base of broadcasting. These arguments, the court stated, misconceived the narrowness of the issue: the permissibility of a total ban by broad-

casters on editorial advertising. The court ordered the Commission to develop reasonable guidelines governing acceptance of editorial advertisements by broadcasters (App. A, pp. 36a–43a) and remanded the cases to the Commission for this purpose (App. A, p. 44a).

Judge McGowan, dissenting, stated that the responsibilities of broadcast licensees to present controversial views on issues of public importance, subject to the fairness doctrine, satisfied the requirements of the First Amendment. He noted that "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. * * * It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired * * *" (App. A, 46a). He concluded that "within the context of a regulatory scheme which has made provision for the airing of controversial issues of public importance," the First Amendment permits, but does not require, licensees to accept paid editorial advertising. (App. A, pp. 46a–47a.)

REASONS FOR GRANTING THE WRIT

Because the broadcast spectrum is limited, its use must be regulated to accommodate the interests of all, lest in the "cacaphony of competing voices" none will be clearly heard. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 376. No individual, therefore, and no group has "an unabridgeable First Amendment right to broadcast comparable

to the right of every individual to speak, write or publish." *Id.* at 388. "It is the right of the viewers and listeners * * * which is paramount." *Id.* at 390. How this objective is to be achieved involves choices among various means of accommodating the public's interest in maintaining freedom of speech with the inherent physical limitations on access to the airways. In the public interest standards of the Communications Act of 1934, and in the 1959 amendment to Section 315 of that Act, Congress charged the Federal Communications Commission with the primary responsibility to make these choices. The decision of the court of appeals in this case substantially encroaches upon that responsibility. It in effect transfers the making of the basic policy judgment from the Commission to the courts, and, in so doing, sets a new and significant course for broadcasting. The importance of this case thus lies not only in the immediate consequences of the court's decision for radio and television broadcasting, but also in the implications of that decision for the proper role of the Commission and the courts in the regulatory system Congress has legislated.

Over the years, as radio and television have assumed greater importance in our society, the Commission's responsibilities have concomitantly increased and a regulatory system has evolved. The Commission, with the subsequent approval of both Congress (47 U.S.C. 315(a)) and this Court (*Red Lion, supra,* at 386–401), has concluded that under the Communications Act broadcast licensees must conduct themselves as public

trustees.[4] They have the duty both to give adequate coverage to public issues and to assure that that coverage fairly and accurately reflects opposing views. See, *e.g.*, Report on *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246; *Fairness Primer*, 29 Fed. Reg. 10415; *Network Programming Inquiry*, 25 Fed. Reg. 7291; Primer on *Ascertainment of Community Problems by Broadcast Applicants*, 36 Fed. Reg. 4092. These duties are grounded on the licensees' statutory obligation "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," 47 U.S.C. 315(a).

In this limited respect, the freedom of broadcast journalism is, because of the inherent physical limitations of the broadcast spectrum, subordinated to the public's interest in hearing diverse views. See *Red Lion, supra.* Moreover, the Commission has made clear that "[a] licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open'" (App. B, p. 61a). The consequence of failure to meet this obligation is, as Judge McGowan recognized, loss of the right to broadcast (App. A, p. 46a).

The court of appeals, however, held that the First Amendment demands more. In the court's view, there is a limited First Amendment right of access. But

[4] See also *Office of Communications of the United Church of Christ* v. *United States*, 359 F. 2d 994 (C.A.D.C.).

the limited right is itself abridgeable; not all members of the public can exercise it and, indeed, the court ruled that the plaintiffs in these cases are not necessarily entitled to present their views on the air (App. A, p. 2a). Instead, the court ordered the Commission to adopt regulations that would govern the selling of time for editorial advertising in light of the court's holding that licensees must make some time available for such advertising. The court thus recognized that in broadcasting the available time must be apportioned in some manner among those who want to present views of public importance.

Given the common First Amendment objective of both the court and the Commission, the court's holding is, in substance, simply a disagreement with the Commission about how best to make that apportionment. For the Commission's concern has always been with ensuring the "right of the public to receive *suitable access* to social, political, esthetic, moral and other ideas and experiences," *Red Lion, supra,* 395 U.S. at 390 (emphasis added). But this collective right of the public depends on what constitutes "suitable access" and that is a practical question, peculiarly suited to administrative determination, which Congress has left primarily with the Commission. Indeed, by basing its disagreement with the Commission on constitutional grounds, the court has not only significantly restricted the ability of the Commission to regulate this important medium of communication in accordance with the agency's informed views of how the public interest will best be served, but has in effect also held that Congress itself is without power to change the court's result.

Congress has chosen to promote broadcasting within the structure of the private enterprise system and, in light of the inherent limitations on access to broadcasting, has expressly declared in Section 3(h) of the Act that licensees are not common carriers (47 U.S.C. 153(h)). Indeed, it has also declared that "no obligation is imposed upon any licensee to allow the use of its station by any [political] candidate." 47 U.S.C. 315(a). Within this statutory structure, careful decisions must be made in regulating the use of broadcast time. In *Red Lion*, the licensees argued that the Commission had gone too far in protecting the rights of listeners and had thereby violated the licensees' First Amendment rights; in this case, groups wishing to express their views on the air claim the Commission has not gone far enough in securing their right to speak and the public's interest in hearing speech. Both cases required the Commission to render a determination in light not only of the regulatory system that Congress had legislated and that, over the years, the Commission had developed, but also of the various interests that must be accommodated within the existing structure of broadcasting. Here the Commission again carefully articulated the practical and legal basis for its policy and concluded that the public's interests in broadcasting are best served by vesting the licensees with broad discretion to discharge their important responsibility of presenting the public with diverse views (App. B, pp. 57a–72a, App. C, pp. 100a–103a).[8] The Commission's de-

[8] Because of this duty, the cases involving access to a regulated forum relied upon by the court of appeals are inapposite. *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis.), affirmed, 441 F. 2d 1257 (C.A. 7); *Zucker* v.

cisions here constitute a reaffirmation of the approach it has evolved in the twenty years since television and radio came of age.[6]

Panitz, 299 F. Supp. 102 (S.D.N.Y.); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y.); *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P. 2d 350 (Wash.); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Reptr. 430, 434 P. 2d 982 (Cal.). These are all cases in which those responsible for access to an advertising forum have no corresponding responsibility to assure balanced coverage of contending positions; nor are there special considerations, as here, which suggest that such an obligation should be imposed. In those cases, the question was simply whether the ideas expressed in editorial advertising were to be given access to the forum at all. Under broadcasters' public interest obligations and the fairness doctrine, however, controversial questions of public importance must be given access to the broadcast forum, although in a format that is subject to licensee discretion.

[6] The Commission's 1945 decision in *United Broadcasting Co.*, 10 F.C.C. 515, relied on by the court of appeals (App. A, pp. 42a–43a), reflects the Commission's view before it had fully articulated licensees' duties under the fairness doctrine. Its basic report on ***Editorializing by Broadcast Licensees***, 13 F.C.C. 1246, was not adopted until 1949; and its *Fairness Primer*, 29 Fed. Reg. 10415, was not published until 1964. Moreover, the statutory public interest standard has always been construed as requiring the licensee itself to determine what programming is in the public interest, *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 905–906 (C.A. 10), and claims of a private right to have material broadcast have been consistently rejected by the courts. *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600–601 (C.A. 3), certiorari denied, 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497, 501 (C.A. 1). See also *David Green* v. *Federal Communications Commission*, 447 F. 2d 323 (C.A.D.C.), noting (*id.* at 328) that "no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom."

What further adjustment and changes are desirable or possible may be considered in the Commission's pending general inquiry into the fairness doctrine.[7] But even if the Commission should reach a result similar to that ordered by the court of appeals, it will have done so only after careful and thorough consideration of the evidence and opinions elicited in this inquiry. The financial burdens on the licensees, whether and to what degree the licensee would be able to control the views and the manner in which they are expressed, the amount of time that should be allocated to controversial advertising, how disputes regarding refusal to sell time to a certain group would be resolved, on what basis a licensee could reject certain controversial advertising—all these factors and many more would have to be taken into account in determining not only what kind of regulations the Commission should adopt to implement a rule requiring that licensees accept public issue advertising, but also whether such a rule should be adopted at all.

The need for engaging in this kind of far-reaching and thorough inquiry before making such a signficant regulatory decision is precisely why Congress decided to create an administrative agency to handle the task. In this case, however, the court has, in Judge McGowan's words, attempted to "dictate the result in advance."[8]

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[7] Notice of Inquiry and Notice of Proposed Rule Making in Dkt. No. 18859, 23 F.C.C. 2d 27, 35 Fed. Reg. 7820; Notice of Inquiry in Dkt. No. 19260, 30 F.C.C. 2d 26, 36 Fed. Reg. 11825.

[8] Indeed, the reasoning of the court of appeals' opinion, which is based on the proposition that "the crucial controls" must be in the hands of the purchaser of time (App. A, p. 23a),

This Court has frequently commented on the impropriety of efforts by a reviewing court to fore-ordain through *ad hoc* determination an agency's orderly development of policy by commanding the adoption of the court's own policy views. *American Lines* v. *L. & N. R. Co.*, 392 U.S. 571, 591–593; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.

This allocation of functions between court and agency is not rendered inapplicable here by the court of appeals' conclusion that a licensee's acceptance of commercial advertising, without also accepting editorial advertising, is unconstitutional discrimination against "preferred" speech. Given the inevitable limitations on access to broadcasting, the question of discrimination is more meaningfully viewed in terms of how the licensee allocates air time between commercial uses and public issue speech, rather than in terms of the format he chooses. The licensees' public interest duty under the fairness doctrine assures that broadcasters, which derive their basic revenues from

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seems to suggest that it would be impermissible to refuse to sell advertising time on the ground that a similar viewpoint has already been adequately presented (App. A, pp. 26a–27a), on the ground that the matter is unimportant (App. A, p. 24a), and perhaps even on the ground that, short of a finding of clear and present danger, the content is unsuitable for entry into the home (App. A, p. 30a). In light of the emphasis on licensee responsibility for the content and overall fairness of its programming in the Commission's regulatory tradition, the Commission's task in attempting meaningfully to implement the decision below would thus be formidable at best (see Judge McGowan's dissenting opinion at App. A, pp. 44a–47a).

commercial advertising, will also devote substantial air time to controversial issues of public importance. There is, therefore, no invidious discrimination against the broadcasting of what the court below called preferred speech.[9]

The court of appeals' decision will have far-reaching effects on the broadcast industry. Each refusal to sell time for editorial advertising will raise potential constitutional questions presumably to be resolved initially by the Commission and ultimately by the courts. Under the Commission's current approach complaints about a licensee's performance in fairly presenting issues of public importance are resolved when raised and evaluation of the licensee's overall performance is undertaken upon complaint at license renewal time. It would now be necessary for the Commission either to provide hasty guidelines or to face a deluge of complaints from innumerable parties denied the right to broadcast their particular editorial advertising during the limited broadcast time available. The First Amendment is not necessarily served by making a government agency the arbiter of who shall speak and who shall not. Cf. 47 U.S.C. 326. Yet that is the role the court of appeals now thrusts upon the Commission, even though it does not seem to be a role Congress intended for the Commission. See 47 U.S.C. 153(h); 47 U.S.C. 315(a); 47 U.S.C. 326.

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[9] For this reason, cases such as *Cox* v. *Louisiana*, 379 U.S. 536; *Fowler* v. *Rhode Island*, 345 U.S. 67; and *Niemotko* v. *Maryland*, 340 U.S. 268, are inapplicable.

CONCLUSION

The issues are important, and well worthy of this Court's consideration. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

No. 24537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS
AMERICAN BROADCASTING COMPANIES, INC. and COLUMBIA BROADCASTING SYSTEM, INC., INTERVENORS

Petitions for Review of Orders of the Federal Communications Commission

Decided August 3, 1971

Before WRIGHT, MCGOWAN and ROBINSON, Circuit Judges

Opinion filed by WRIGHT, Circuit Judge
Dissenting opinion filed by MCGOWAN, Circuit Judge

WRIGHT, *Circuit Judge:* In these cases we are asked to decide whether a broadcast licensee may, as a gen-

eral policy, refuse to sell any of its advertising time to groups or individuals wishing to speak out on controversial public issues. The Federal Communications Commission concluded that such a policy is permissible.[1] We reverse the Commission's decision. And we remand for further proceedings.

The principle at stake here is one of fundamental importance: it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. More specifically, it concerns the application of that right to the substantial portion of the broadcast day which is sold for advertising. For too long advertising has been considered a virtual free fire zone, largely ungoverned by regulatory guidelines. As a result, a cloying blandness and commercialism—sometimes said to be characteristic of radio and television as a whole—have found an especially effective outlet. We are convinced that the time has come for the Commission to cease abdicating responsibility over the uses of advertising time. Indeed, we are convinced that broadcast advertising has great potential for enlivening and enriching debate on public issues, rather than drugging it with an overdose of non-ideas and non-issues as is now the case.

Under attack here is an allegedly common practice in the broadcast industry—airing only those paid presentations which advertise products or which deal with "noncontroversial" matters, and confining the discussion of controversial public issues to formats such as the news or documentaries which are tightly controlled and edited by the broadcaster. In the Commission's view, an attack on the permissibility of this practice

[1] *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970); *Democratic National Committee*, 25 F.C.C. 2d 216 (1970).

"goes to the heart of the system of broadcasting which has developed in this country."[2] We disagree. The actual issue before us is relatively narrow and we decide it narrowly. We do not have to cut to the "heart" of our system of broadcasting; we leave undisturbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

I

Both petitioners in these cases are organizations whose primary *modus operandi* is public persuasion and communication. As a rule, they do not attract attention to their views by performing newsworthy acts, such as engaging in civil disobedience or organizing mass demonstrations. They depend, instead, on their ability to get a hearing—as full as possible and as direct as possible—from the general public. Surely radio and television would seem to be the most effective

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[2] *Democratic National Committee, supra* Note 1, 25 F.C.C. 2d at 221.

media for their purposes. Yet they contend that their self-expression on those media—and, therefore, the public's access to their views—is significantly inhibited by broadcaster policies barring any and all paid editorial messages from the airwaves.

The Business Executives Move for Vietnam Peace (BEM) is a national organization of over 2,700 business owners and executives, organized in opposition to the war. BEM apparently believes that it is in a position to offer the public a unique viewpoint on what is no doubt one of the great political and moral issues of our time. In order to communicate that viewpoint, it prepared several recorded one-minute radio announcements. The announcements urged "immediate withdrawal of American forces from Vietnam and from other overseas military installations" and featured statements by leading businessmen and retired military officers whose views may carry particular weight with the general public. BEM sought to buy time to air these announcements on the broadcast media, just as commercial advertisers do. It must have seemed an extraordinarily effective means of directly communicating its ideas and sense of urgency to the broad listening audience.

In June 1969 BEM sought to purchase time for its announcements on WTOP, an all-news radio station in the nation's capital. Like most broadcasters, WTOP sells substantial amounts of time for short advertisements. Yet over a period of eight months it repeatedly refused to sell any time to the business executives. WTOP cited no particular objection to the planned announcements. Rather, it relied solely upon an across-the-board policy barring all editorial advertisements—"its long established policy of refusing to sell spot announcement time to individuals

or groups to set forth views on controversial issues."[3] BEM then filed a complaint with the Federal Communications Commission alleging violations of both the fairness doctrine and the First Amendment.

The Democratic National Committee (DNC) came to the Commission with much the same sort of complaint. It stated that it was in the process of planning an extensive media campaign to communicate the Democratic Party's views on crucial issues and to solicit funds. In our political system, it is of obvious importance that the public have access—as direct and full as possible—to the views of the political parties. A party currently out of office may well regard such communication as particularly vital. Yet DNC alleged that it confronted several obstacles to diret self-expression on the broadcast media, among them the refusal of some broadcasters to sell time for comment on controversial public issues. Unlike the business executives, DNC did not complain of any individual refusal to sell time for a particular editorial advertisement. Rather, it cast the issue in a somewhat different light by seeking a declaratory ruling from the Commission that "[a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitations of funds and for comment on public issues."

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[3] WTOP also stated "that 'subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.'" *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C. 2d at 242. There is no indication, however, that WTOP's "long established policy" of refusing to sell time for *any* controversial advertisement would have permitted it to sell BEM 5 minutes or 10 minutes for a more "in-depth" treatment of its antiwar views. For a discussion of the permissibility of a flat ban on "short" public issue advertisements, *see* text at pages 28–29 *infra*.

The Commission considered the two cases together and rejected the arguments of both BEM and DNC on the same day. The isues involved did not overlap completely. For example, the Commission found a defect in the vagueness and generality of BEM's fairness doctrine complaint,[4] and it resolved DNC's contention concerning fund solicitation by noting that all three television networks had agreed to accept such solicitations and by stating that any broadcaster policy of confining solicitations to election periods alone "would appear arbitrary." [5] On the matters

[4] In its original complaint, BEM alleged generally that WTOP had failed to cover antiwar views fully and fairly. However, it offered no specific proof whatever of its allegations, and WTOP, on the other hand, offered a lengthy compilation of news and interview shows which aired the opinions of some antiwar groups and individuals. BEM has not pressed its fairness doctrine argument on appeal, but rather has relied solely upon the First Amendment right-of-access contention which it also made before the Commission. Therefore, we need not consider here the Commission's holding that BEM failed to shoulder its full burden of going forward under the fairness doctrine.

[5] All three television networks also commented on the sale of time for editorial advertising. CBS stated it would sell no time for such advertising, although an exception would be made for broadcasts on behalf of political candidates or ballot propositions. ABC said it would not sell time to most groups for public issue advertising since that would inspire a "flood" of requests, but it would "be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis." And NBC stated it "has no policy which would prevent the purchase of program time envisioned by DNC." We are constrained to note here that any discrimination in the sale of editorial advertising time in favor of political parties alone or the "major" political parties—and totally excluding other more issue-oriented groups or "minor" political parties—would be highly suspect under the First Amendment. *See* text at pages 33–35 *infra*.

central to these petitions for review, however, the Commission resolved both cases in the same fashion, and we, therefore, are also considering them as one.

The Commission held that it is permissible for a broadcast licensee to follow a general policy of rejecting all editorial advertisements. The essence of its reasoning in the two cases was as follows: First, it interpreted the fairness doctrine to allow rejection of paid controversial announcements. The doctrine, evolved by the Commission and endorsed generally in the Communications Act, demands that all controversial issues of public importance be covered both fully and fairly by broadcasters. Yet the Commission held that it leaves the licensees broad leeway to exercise their professional judgment as to "the format for presentation of controversial issues 'and all others facets of such programming.' " Editorial advertising, the Commission said, is simply one of several possible formats for coverage of public issues. Under the permissive "reasonableness" standard of the fairness doctrine, acceptance of that particular format is by no means compulsory.

Second, the Commission interpreted the First Amendment to be equally permissive. Its reasoning on this point was rather sparse. It made no effort, for example, to identify the peculiar First Amendment interests attaching to paid editorial announcements as opposed to coverage of controversial issues on news, interview or discussion programs. Instead, it was content to raise the spectre of the "chaos" and other practical difficulties that, it said, would attend a right of access to the broadcast media. The Commission concluded that the fairness doctrine's requirement of full and fair coverage—tolerant as it is of a flat ban on the editorial advertisement format of expression—

provides as much protection of public debate as the First Amendment demands.

Before this court, both petitioners make substantially the same attack on the Commission's decision. They do not ask for a ruling that *all* editorial advertisements submitted to broadcasters must be accepted. Nor do they seek to foreclose entirely the broadcasters' exercise of reasonable discretion. What they advocate is a *limited* right of access to radio and television for paid public issue announcements. They attack the Commission's ruling that a total exclusion of such announcement is permissible.

II

Petitioners have left no stone unturned in their attack on the exclusion of editorial advertising. They have invoked the Communications Act's "public interest" requirement [6] and the statutory-regulatory fairness requirement [7]—as well as First Amendment principles—to support their argument. In other contexts, we might attempt to avoid the constitutional issue by coming to a decision on nonconstitutional grounds. But that course is neither fruitful nor possible here.

Speaking specifically of the Commission, the Supreme Court has stressed the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). Thus the nonconstitutional question here is whether

[6] 47 U.S.C. §§ 307(d), 309(a) (1964).

[7] 47 U.S.C. § 315(a) (1964). For a discussion of the regulatory development of the fairness doctrine and its eventual adoption in the Communications Act, *see Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375–381 (1969).

there are "compelling indications" that the public interest and fairness requirements compel some opening for public issue advertisements on radio and television. In matters of allocating burdens, reforming procedures and ensuring full attention to all relevant factors in agency decision making, we have not been reluctant to reverse the Commission in order to vindicate "the public interest."[8] We have also intervened to see that broad policies developed by the Commission under the fairness doctrine are applied fully and consistently to all cases.[9] However, when we are asked to reverse major substantive interpretations of the grand and open-ended statutory requirements, we tread somewhat more difficult terrain. Obviously, the requirements mean something and there must be a great range of actions which they foreclose to the Commission; but, in establishing the necessary guidelines, we must ourselves seek extrinsic guidance.

In these cases, that guidance comes from the Constitution. Petitioners have presented no "compelling" evidence from legislative history to indicate a congressional policy in favor of, or even a real congressional attention to, editorial advertising. Rather, their arguments on the nonconstitutional points closely parallel their constitutional arguments. The general policy considerations which they invoke encompass all of the interests that would have to be evaluated under the relevant First Amendment law. It would make no sense for us to blind ourselves to the constitutional status of those interests and to the doctrine that has been built up around them.

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[8] *See, e.g., Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966); 138 U.S. App. D.C. 112, 425 F. 2d 543 (1969).

[9] *See, e.g., Retail Store Employees Union, Local 880* v. *F.C.C.*, —— U.S. App. D.C. ——, 436 F. 2d 248 (1970).

What then might be the "compelling indications" we are to consider? The ones which seem to us truly "compelling" involve First Amendment principles. Thus we conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a "First Amendment decision" or as a decision interpreting the fairness and public interest requirements "in light of the First Amendment" matters little.

III

It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress. Until quite recently, the only interest raised to constitutional status was that of the broadcast licensees themselves. In a leading case, the Commission's powers over program content were attacked and upheld with reference solely to the licensees' right of immunity from governmental interference with their "speech." The scarcity of broadcast frequencies was said to justify some regulation trenching on the broadcasters' First Amendment interests. *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). These cases mark a new effort by members of the public to assert *their* First Amendment interests in the operations of radio and television.

There is scant precedent for such an effort. Indeed, the few previous attempts by individuals or groups to

[10] *See, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

enforce their First Amendment interests in court have failed. In each case, the litigants have run up against not only an unreceptiveness to their constitutional theory, but also a crabbed judicial view of "state action"—a view that the "[First] Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as [broadcast licensees]." *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 1 Cir., 183 F.2d 497, 501 (1950); *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 3 Cir., 151 F. 2d 597, 601 (1945). *See also Post* v. *Payton*, E.D. N.Y., 323 F.Supp. 799 (1971).

We believe the path is now clear of such doctrinal impedimenta. Perhaps the most important recent development is the Supreme Court's seminal decision in *Red Lion Broadcasting Co., supra.* There the Court upheld another aspect of the Commission's regulation of program content—the fairness doctrine's personal attack and campaign editorial rules. However, the Court's opinion went well beyond the scarcity rationale of the *National Broadcasting Co.* case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their * * * collective right to have the medium function consistently with the ends and purposes of the First Amendment." [11] It went on to say:

"* * * The right of free speech of a broad-

[11] 395 U.S. at 390.

caster * * * does not embrace a right to snuff out the free speech of others. * * *

* * * * *

"* * * [A] licensee has no constitutional right * * * to monopolize a radio frequency to the exclusion of his fellow citizens. * * *

* * * * *

"* * * It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. * * *"[12]

Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches. The First Amendment, after all, contains nothing analogous to the fifth section of the Fourteenth Amendment, authorizing Congress to enforce constitutional interests unenforceable by the courts.[13]

For many purposes, it is proper to consider broadcast licensees as "private" businesses. Yet, for purposes

[12] *Id.* at 387, 389, 390.

[13] On the effect of the specific language in the fifth section of the Fourteenth Amendment, *see Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Of course, the Fourteenth Amendment does not apply to federal regulation of the broadcast industry, since no interference with the states is involved.

of the First Amendment, "[o]wnership does not always mean absolute dominion." *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946). "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton,* 382 U.S. 296, 299 (1966). The *Red Lion* Court itself commented on the impermissibility of "private censorship" and cited old doctrine that " '[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' "[14] The reach of the First Amendment, therefore, depends not upon "public"—"private" technicalities, but upon more functional considerations. They are (1) the governmental involvement in or public character of a particular enterprise, and (2) the importance or suitability of that enterprise for the communication of ideas.[15]

[14] 395 U.S. at 392, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[15] Most "state action" cases, of course, have been concerned with equal protection rights under the Fourteenth Amendment rather than with free speech rights under the First Amendment. However, the principle of governmental involvement developed therein has been applied equally well in the First Amendment context. *See, e.g., Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451 (1952); *Farmer* v. *Moses,* S.D. N.Y., 232 F. Supp. 154 (1964). The principle of "public character" may be found in decisions dealing directly with application of First Amendment rights to "private" entities. *See, e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968); *Tanner* v. *Lloyd Corp.,* D. Ore., 308 F.Supp. 128 (1970); *Diamond* v. *Bland,* 91 Cal. Rptr 501, 477 P. 2d 733 (1970). The importance and suitability of a particular place for the communication of ideas has been stressed in all of the cases cited above, as well as in all of the access-to-public-forum cases, *see* Notes 40–43 *infra.*

The last few decades of court decisions expanding the concept of "state action" have focused on myriad indicia of governmental involvement and public character. Many of them are apparently applicable to the operations of the broadcast industry.[16] But we need stress only two more basic factors which, taken together, bring broadcast licensees well within the ambit of the First Amendment for the purposes of these cases. First, the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others.[17] It is one of "interdependence" and "joint participa[tion]." See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). "[T]he [federal] regulatory system," it has been said, "is as much responsible for the existence of a broadcasting medium as the Bureau of Engraving is respon-

[16] Dissenting in the BEM case now under review, Commissioner Johnson dealt exhaustively with the Supreme Court's state action doctrine, isolating eight separate indicia of "state action." He argued very strongly that all eight indicia apply to broadcast licensees. *Business Executives Move for Vietnam Peace*, *supra* Note 1, 25 F.C.C. 2d at 253–264. Because this highly analytical—one might say mechanical—approach runs the risk of reading Supreme Court opinions for more than they mean, we have chosen to paint with a broader brush. Ours is the approach which the Supreme Court seems in fact to have used in the past.

[17] In particular, broadcasting may be easily distinguished from the newspaper industry in terms of "state action." In two recent decisions, courts have held that newspapers are not subject to the First Amendment. *Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 9 Cir., 440 F. 2d 133 (1971); *Chicago Joint Board* v. *Chicago Tribune Co.*, 7 Cir., —— F. 2d ——, 39 U.S. L. WEEK 2360 (December 17, 1970). While the governmental involvement in and public character of newspapers in surely less than that of broadcasting, we of course need express neither agreement nor disagreement with the cited decisions here.

sible for the existence of United States currency." [18] It has long been recognized that the airwaves are "a limited and valuable part of the public domain," [19] leased out temporarily by the federal government which retains ultimate control over them.[20] Federal agency review and guidance of broadcasters' conduct is automatic, continuing and pervasive.[21] For broadcast licensees are considered the "proxies" or "fiduci-

[18] Pemberton, *The Right of Access to Mass Media*, in N. Dorsen (ed.), The Rights of Americans 277, 290 (1971). The Government is also directly responsible for the very existence of particular broadcasters. "[E]xisting broadcasters have often attained their present position because of their initial government selection in competition with others * * *. * * * [Their present] advantages are the fruit of a preferred position conferred by the Government." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 400.

[19] *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S. App. D.C. at 337, 359 F. 2d at 1003.

[20] The licensing-out or delegation of governmental authority has been an element in some of the Supreme Court's most expansive state action decisions. *See Evans* v. *Newton*, 382 U.S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Smith* v. *Allwright*, 321 U.S. 649 (1944). The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action; licensed pharmacists cannot be equated with licensed broadcasters. The actual extent of governmental involvement and the public character of the enterprise in question remain the final tests of state action.

[21] The activities of a governmental regulatory agency have also been emphasized in at least one of the Supreme Court's expansive state action decisions. *See Public Utilities Comm'n* v. *Pollak*, *supra* Note 15, 343 U.S. at 462, *citing American Communications Ass'n* v. *Douds*, 339 U.S. 382, 401 (1950) ("[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.").

aries" of the people.[22] Almost no other private business—almost no other regulated private business—is so intimately bound to government and to service to the commonweal.

A second and even more important factor is the *specific* governmental involvement in the broadcasters' action now under review here. All of the cases in which previous courts have characterized broadcasters as mere "private corporations" immune from First Amendment constraints, *see* text at page 12 *supra,* have involved direct suits against broadcast licensees. In the cases before us now, however, the Commission has given its imprimatur to the flat ban on editorial advertising. It specifically considered and specifically authorized the flat ban. Thus we are called upon to review not simply a private decision, but a decision by a government agency, a decision which must inevitably provide guidance for future broadcaster action.

There is ample authority for the principle that specific governmental approval of or acquiescence in challenged action by a private organization indicates "state action."[23] Indeed, in a case similar to

[22] *See Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 394, 396; *Office of Communication of United Church of Christ* v. *F.C.C.*, *supra* Note 8, 123 U.S. App. D.C. at 337, 359 F. 2d at 1003.

[23] The Supreme Court has said that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State * * *." *Shelley* v. *Kraemer*, 334 U.S. 1, 14 (1948). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L. J. 219, 227–230. *See also* this court's discussion of the *Shelley* principle—which surely must apply to actions of a federal administrative agency specifically approving private action—in *Edwards* v. *Habib*, 130 U.S. App. D.C. 126, 397 F. 2d 687

ours the Supreme Court held that a private bus company franchised by the federal government and regulated by the District of Columbia Public Utilities Commission could be subject to First Amendment constraints. It emphasized the specific regulatory acquiescence in the challenged action of the bus company:

> "* * * In finding [state action] we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the [challenged action], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. * * *"

Public Utilities Commission v. *Pollak,* 343 U.S. 451, 462 (1952). (Footnote omitted.)

Broadcasting's importance and suitability for communication of ideas need not be labored. Mere presence of large and appropriate audiences (and thus opportunities for effective communication) has sometimes been emphasized by the courts to show the rel-

(1968). Specific governmental acquiescence, as well as specific approval, has also been a focus of Supreme Court state action decisions. *See Marsh* v. *Alabama, supra* Note 15, 326 U.S. at 507 & n. 4. 509; *Burton* v. *Wilmington Parking Authority, supra* Note 20, 365 U.S. at 725.

evance of First Amendment protections.[24] In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), for example, the Supreme Court held that a privately owned shopping center was an appropriate place for the "speech" of labor union picketers. It stressed "[t]he large-scale movement of the country's population from the cities to the suburbs [that] has been accompanied by the advent of the suburban shopping center * * *." *Id.* at 324. With this demographic change, the "speech" that once took place on the public streets around downtown shopping areas must be allowed to move to privately owned parking areas in the suburbs, for that is where the relevant audiences now are. The technological and cultural changes connected to the current preeminence of the broadcast media as our primary means of communication are no less striking. The soap box orator and the leafleter are becoming almost obsolescent; their Saturday afternoon audiences have increasingly moved indoors—in front of their television sets.[25]

Moreover, unlike most of the private entities held to be subject to First Amendment constraints, the broad-

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[24] *See, e.g., Wolin* v. *Port of New York Authority*, 2 Cir., 392 F. 2d 83, 90–91 (1968) ("The propriety of a place for use as a public forum * * * [may be established if] the place is where the relevant audience may be found."). Of course, the cases before us involve the right to speak on a *medium* of communication, but not in a particular *place*. Thus many of the considerations are different; but the basic concern with the ability to reach the relevant audience applies in both situations.

[25] The Supreme Court has noted that broadcast "technology * * * supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news * * *." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386 n.15.

cast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other "private" enterprise.

IV

Broadcast licensees, then, serve not only as "speakers" but also as administrators of a highly valuable communications resource, subject to First Amendment constraints. Their dual role demands that their own constitutional interests in free speech coexist with those of the general public. But what are the dimensions of the public's First Amendment interests in the operation of radio and television? And how do they apply to the issue of editorial advertising?

It is particularly important that these cases deal only with the public's First Amendment interests in broadcasters' allocation of advertising time. They deal only with time relinquished by broadcasters to others; petitioners argue only that, in relinquishing that time, broadcasters must not discriminate against protected expression. In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong.[26] The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no

[26] *See id.* at 396.

such strong First Amendment interests. *Their* speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.

Though the broadcasters themselves have no substantial First Amendment interest in the allocation of advertising time, we might expect that the interest of members of the public—potential advertisers—would be quite strong. However, the Commission and the broadcaster-intervenors have argued just the opposite. They contend that the public's constitutional concerns do not extend to advertising time. Thus we must decide whether the substantial block of the broadcast day devoted to advertising is but a vacuum, devoid of First Amendment constraints, in the midst of a medium powerfully affected by those constraints—a desert in the midst of an oasis.

The Commission and intervenors work from the following premise. They define the public's overall constitutional interests in the operations of radio and television quite narrowly. The public's only interest, they suggest, is as viewers and listeners—not as speakers. They cite to us the *Red Lion* Court's mention of "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences" over the broadcast media.[27] And they read that statement to set forth not only *an* interest of the public, but the *only* interest of the public.

Working from that premise, the Commission and intervenors contend that the public already receives "suitable access" to controversial views on normal programming time. Application of the fairness doctrine's requirement of full and fair coverage of public issues in non-advertising time, they suggest, ensures that all views on these issues will in fact be presented.

[27] *Id.* at 390.

They assume that editorial advertising adds nothing new to the debate. The fairness guarantee alone, they say, is enough to eliminate petitioners' claim on advertising time—and enough to satisfy the First Amendment. We disagree.

Surely the public's interest in free access to the full spectrum of ideas and controversial views on radio and television is highly important. The right to receive ideas and information is deeply rooted in First Amendment law.[28] The *Red Lion* Court stressed that right, since it was the one primarily relevant to the fairness doctrine rules at issue in the case. But we do not believe that the *Red Lion* decision makes the goal of an informed public the exclusive First Amendment interest constraining broadcasters. Certainly the Supreme Court has done so in no other context.

The public has a First Amendment interest in the mode or manner—as well as the content—of public debate aired on the broadcast media. The *Red Lion* Court itself stated specifically that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas [in the broadcast media]."[29] This court, similarly, has said that the Commission is obliged to administer the airways "in such a manner that * * * debate on public issues is 'uninhibited, robust and wide-open.'" *National Ass'n of Theatre Owners* v. *F.C.C.*, 136 U.S. App. D.C. 352, 365, 420 F. 2d 194, 207 (1969). The reference to "uninhibited" debate is, of course, borrowed from the Su-

[28] *See Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307–308 (1965) (Mr. Justice Brennan, concurring); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943). The "right to receive," however, has not been considered the central First Amendment interest, and never the only First Amendment interest.

[29] 395 U.S. at 390. (Emphasis added.)

preme Court's decision in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). The Court there extended First Amendment protection to some forms of libel on public officials. It made clear that the Amendment's concern extends beyond the mere fostering of speech whose content will properly inform the public. The *New York Times* decision establishes a strong First Amendment interest in vigorous, "wide-open" public debate.

Furthermore, we must take note of a third—but, perhaps, most important—First Amendment interest. That is the interest of individuals and groups in effective self-expression. The *Red Lion* Court did say that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." [30] For, as it pointed out, broadcast time is necessarily limited. But the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated, "abridgeable" right to speak. The First Amendment values of individual self-fulfillment through expression and individual participation in public debate have long been recognized.[31] We all have an interest in speaking up ourselves as well as in hearing others. It is too late to argue that the First Amendment protects ideas but not an individual's interest in expressing them and doing so in his own way.

We conclude, then, that the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-

[30] *Id.* at 388.

[31] *See, e.g.*, T. Emerson, Toward a General Theory of the First Amendment 4–7 (Vintage ed. 1967).

expression.[32] How do these three First Amendments interests relate to a more specific interest in the airing of editorial advertisements? The answer emerges when we understand the special importance of advertising time to our system of free expression. First, the initial decision to produce an editorial advertisement is in the hands of members of the public. The initiative to present a particular view does not have to come from a member of the broadcaster's staff. Second, a paid advertisement is basically controlled and edited by the advertiser. He is allowed to present his views in a fashion chosen by himself. If an individual is interviewed for a news program, he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say. For it is the broadcasters' responsibility to be objective, to condense issues into available time for presentation, and to play up or play down views according to the *broadcaster's* opinion of what is important and interesting. But when an individual or group buys time to say its piece, the crucial controls are in its own hands. Editorial advertising is thus a special and separate mode of expression, not simply a duplication of other expression on the same medium.[33]

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[32] Of course, all three of these interests apply to non-advertising time as well as to advertising time. The Commission, in fact, has encouraged broadcasters to present conflicting views through partisan voices as well as through predigested commentary. *See Democratic National Committee*, *supra* Note 1, 25 F.C.C. 2d at 222–223. However, as we make clear in text, the selective edited presentation by the Government's licensee of partisan voices on news shows, for example, does not erase the *special* advantages of allowing self-selected partisan voices on advertising time.

[33] *See* text at pages 27–29 & Note 37 *infra*. *See also* Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532, 557–560 (1971).

The importance of initiative and control to the First Amendment interests in wide-open debate and individual self-expression should be obvious. Vigorous, free expression is promoted when members of the public have *some* opportunity to take the initiative and editorial control into their own hands on the broadcast media. It has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others. In the First Amendment area, our best guarantee has always been a "free market" in which partisans who feel strongly on particular issues may decide on their own to speak out and to speak out in their own way. The present system, allowing a flat ban on editorial advertising, conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are "important," how "fully" to cover them, and the format, time and style of the coverage.

Even if broadcasters were to succeed in presenting a full spectrum of viewpoints and partisan spokesmen on non-advertising time, their retention of *total* initiative and editorial control is inimical to the First Amendment. The importance of fair, objective and full treatment of controversial issues on normal programming cannot be doubted. But, as the Supreme Court has said in the context of classroom debate, "supervised and ordained discussion" is not enough. *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969). "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). In other words, there is always a strong First Amendment interest in opening up

channels for more spontaneous, self-initiated, self-controlled expression.[34]

[34] We are cognizant of current proposals to reform the Commission's fairness doctrine and invigorate its enforcement, so lackluster in the past. We commend the Commission's consideration of new rules to "encourage and implement" presentation of opposing viewpoints by reemphasizing the obligation to "seek out" controversial issues. *Obligations of Broadcast Licensee Under the Fairness Doctrine*, 35 FED. REG. 7820 (1970). But, as the Commission says, the proposed rules would be but a "modest * * * step in promoting access to the media." *Id.* at 7821. They go little beyond the present obligation to give "full" coverage to controversial issues. Such an obligation is inherently difficult to define and enforce. At best, the Commission can evaluate only the *general* willingness of a licensee to "seek out" issues and glaring examples of noncoverage of obviously important issues. The Commission cannot be expected to engage licensees in fine debates over coverage of less obviously life-or-death issues. But the fundamental point—the point we emphasize—is that no matter how "fully" controversial issues might be covered in a perfect broadcasting world, the basic initiative and control remains with the licensee. Because there is not even a partial "free market" opening to the public at large, the crucial First Amendment interests in decentralized initiative and control go unsatisfied.

We realize that there is another possible, but purely speculative, reformation of the fairness doctrine now under consideration which might be supposed to obviate the need for a measure of "free market" access to advertising time. It has been proposed that licensees be required to provide self-edited advertising time to groups or individuals under the fairness doctrine only when a commercial advertiser has already taken a controversial position in his broadcast messages. Such an approach has been taken regarding cigarette advertisements, though that case was said to be extraordinary and not to establish a general precedent. *Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F. 2d 1082 (1968). But even if that principle were made to apply generally, it would leave the initiative solely in the hands of commercial advertisers: the only issues on which noncommercial groups and individuals could speak through editorial advertisements would be those issues which commercial advertisers had already chosen to raise themselves. Allowing such a narrow group, motivated largely by busi-

Even in terms of the public's First Amendment interest emphasized by the Commission and intervenors—the interest of "viewers and listeners" in passive access to the full spectrum of viewpoints on radio and television—editorial advertising plays an important role. The concept of "full" coverage of "controversial" issues "of public importance" is vague to say the least, and leaves much to the broadcasters' discretion (and possible oversight).[35] Assuming that broadcasters are sometimes fallible, the goal of a fully informed public is best attained by opening of outlets for members of the public to supplement the licensees' assessments of "importance," "controversiality" and "full" coverage. The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time.[36] The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements.

Moreover, even if "antiwar views," for example, have in fact been presented on news and interview

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ness profit, to set the agenda for editorial advertising is unconscionable and contrary to First Amendment precepts. It is crucial that noncommercial groups and individuals have the same rights of initiative as commercial advertisers.

[35] The guarantees of full and fair coverage have proved particularly difficult to define and enforce in the past. They have taken on effective meaning only in the most extreme cases of broadcaster irresponsibility. For a depressing critique of the Commission's apparent inability to enforce its own standards, *see* Cox & Johnson, *Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study*, 14 F.C.C. 2d 1 (1968).

[36] Even then, however, the special attributes of editorial advertising would not be eliminated by the broadcaster's own coverage. *See* text at pages 23–25 *supra* and pages 27–29 *infra*.

shows, it is not *necessarily* clear that a particular anti-war editorial advertisement would add nothing to the public's information and understanding. "Viewpoints" cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components.[37] Again, an across-the-board ban on editorial advertisements—leaving the quality of public debate in the control of one licensee, supplemented by no other autonomous inputs—may well ignore opportunities to enliven and enrich the public's overall information.

We recognize, of course, that the onesidedness and private editing of particular "spot" editorial advertisements may in the end steer viewers and listeners away from the "truth" by distorting complex issues. Being brief, these "spot" messages—no less than normal broadcast news coverage—may not canvass all possible arguments or develop all possible implications of the position they espouse. But that does not mean that

[37] In *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F. 2d 1257 (1971), the court held that a school newspaper was obliged under the First Amendment to print antiwar editorial advertising, even though antiwar views could be printed in the newspaper's news and letters-to-the-editor columns. The court stressed the qualitative—and valuable—difference in expression of views through an editorial advertisement. "It is readily apparent," it said, "that a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor. Large type, photographs, repeated publication and full pages of space are some of the modes of expression available in an editorial advertisement that might not be available in a letter to the editor." *Id.* at 1101. Another court has come to the same result in a newspaper editorial advertising case. *Zucker* v. *Panitz*, S.D. N.Y., 299 F. Supp. 102 (1969). *See* text at pages 31–32 *infra*.

they are unprotected by the First Amendment. Our Constitution protects many forms of misleading and overly simplified political expression in order to ensure robust, wide-open debate. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct * * *." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 273. Nor does the brevity of the criticism. We must, then, be very, very slow to judge any sort of speech on public issues worthless. The marketplace of ideas protected by the First Amendment, after all, is not governed by the tastes and intellectual standards of the universities or the broadcast newsroom—or even of judicial chambers.

We conclude, therefore, that the fairness doctrine's goal of full and fair coverage of issues on normal programming time does not eliminate the public's interest in a further, complementary airing of controversial views during advertising time. We must concur in the Supreme Court's only recorded comments on constitutional protection for editorial advertising—comments made in the context of newspapers, like broadcasting a medium which may be expected, if not required, to present the various sides of public issues in its non-advertising space. The Court said that editorial advertisements, unlike commercial advertisements,[38] are of fundamental First Amendment concern, since they deal with political questions. And it protected them from libel law attack to the same extent as the newspapers' own editorial columns, for

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[38] Commercial advertising—indeed, any sort of commercial speech—is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment. *See Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

> "[a]ny other conclusion * * * might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. * * * The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' * * *"

New York Times Co. v. *Sullivan*, *supra*, 376 U.S. at 266.

V

We come now to the aspect of the broadcasters' policy which, petitioners say, trenches on the First Amendment interest in editorial advertising. The constitutional defect of that policy is somewhat ironic. The *New York Times* Court made clear that the fact distinguishing fully protected editorial advertising from less fully protected commercial advertising is that the former deals with controversial public issues. Indeed, the political nature of editorial advertising places it near the core of the First Amendment. However, the very characteristic which affords it strict constitutional protection is also the characteristic causing the broadcasters' challenged policy to single it out and exclude it from the airwaves. That, we believe, is the crucial aspect of these cases.

It is important to note that petitioners do not attack the exclusion of editorial advertising by broadcasters who accept no advertisements whatever.[39] We

[39] DNC's position is somewhat ambiguous. The ruling which it requested from the Commission would, by its terms, apply to all broadcasters, whether or not they accept any advertising. *See* text at page 6 *supra*. However, on appeal DNC's arguments have been focused entirely on broadcasters who do

do not have to decide whether the broadcast medium inherently amounts to a "public forum" on the order of public streets or parks or meeting halls or even bus terminals.[40] We leave open the possibility that broadcasters may constitutionally relinquish no time at all for advertising of any sort. For the issue in these cases is the permissibility of discrimination, within a given block of advertising time, against "controversial" speech and in favor of commercial and "noncontroversial" speech. We deal here with a forum that already has been opened up by the licensees themselves, opened up for direct broadcast presentations by members of the public.

Fortunately, we do not write on a clean slate in this area. Six courts have confronted discriminations among types of speech like the one challenged here. Every one of them—four federal courts and two state supreme courts—has held that once a forum, subject to First Amendment constraints, has been opened up for commercial and "noncontroversial" advertising, a ban on "controversial" editorial advertising is unconstitutional unless clearly justified by a "clear and present danger." *Lee* v. *Board of Regents of State Colleges*, W.D. Wis., 306 F. Supp. 1097 (1969), *affirmed*, 7 Cir., 441 F. 2d 1257 (1971); *Zucker* v. *Panitz*, S.D. N.Y., 299 F. Supp. 102 (1969); *Kissinger*

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already accept noncontroversial advertising. The interests of particular licensees in keeping all advertising off the air were not explored before the Commission or before this court—for example, an all music station may have a very substantial interest in broadcasting no paid announcements. Because the special issues relating to such licensees were not presented here, we do not decide them.

[40] *See, e.g., Schneider* v. *State*, 308 U.S. 147 (1939); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Wolin* v. *Port of New York Authority*, *supra* Note 24. *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1.

v. *New York City Transit Authority*, S.D. N.Y., 274 F. Supp. 438 (1967); *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P. 2d 982 (1967). We join this unbroken line of authority.

First Amendment doctrine governing access to forums for communication has been elaborated often in recent years. The essential test is an exercise in balancing, though weighted in favor of First Amendment values.[41] On one hand, the court must assess the constitutionally protected interest in the particular expressive activity in the particular forum. On the other hand, it must assess the importance of other uses of the forum which may be threatened and the extent to which they actually will be disrupted. Access may be denied only if the disruption caused by a particular type of expression (*e.g.*, public speaking, marching, picketing) clearly overrides the "preferred" interest in free speech. Thus there is some right of access by demonstrators to state capitol grounds[42] but not to a jailyard.[43]

Ordinarily, courts have to make the basic balancing judgment on their own. However, when the adminis-

[41] Most of the cases, other than those cited above in text, have involved access to particular places in order to perform expressive activities such as speaking, leafleting, or demonstrating in some fashion. For general discussions of the cases and the principles applied, *see* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (paper ed. 1965); Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773 (1967). There is no reason why the general principles applied in cases involving access to *places* should not apply to our cases involving access to a particular *medium* of expression. *See* Note 24 *supra*.

[42] *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

[43] *Adderley* v. *Florida*, 385 U.S. 39 (1966).

trator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers, he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption they would cause from that caused by the speaking or picketing already allowed.

The same principle applies to broadcasters who have opened their forum to commercial speech but would close it to controversial political speech. By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

The content of the idea which the excluded speakers seek to promote is—emphatically—*not* permitted as a distinguishing factor in itself. Indeed, the existence of an exclusionary discrimination apparently based on the content of ideas presents an additional, or greatly heightened, *prima facie* constitutional violation. Both free speech and equal protection principles condemn any discrimination among speakers which is based on

what they intend to say." If the First Amendment prohibits anything at all, it must be a censorial discrimination among ideas. And since First Amendment rights have been held to be "fundamental rights" triggering the strict standard of review under equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed.

At least 20 years ago, the Supreme Court began condemning discriminations among different exercises of the same type of expression. *Fowler* v. *Rhode Island*, 354 U.S. 67 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272–273 (1951). Both cases involved access to a forum already opened to others. More recently, the Court in *Cox* v. *Louisiana*, 379 U.S. 536 (1965), invalidated a state regulation that permitted labor picketing but not civil rights picketing. In his concurrence, Mr. Justice Black stated that this sort of discrimination is "censorship in a most odious form" and violates both the First Amendment and the equal protection clause. *Id.* at 581. Similarly, in *Adderley* v. *Florida*, 385 U. S. 39 (1966), the Court upheld a ban on demonstrations in a jailyard, but was careful to note that "[t]here is not a shred of evidence in this record * * * [the demonstrators were excluded] because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." *Id.* at 47.

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[11] For discussions of the First Amendment-equal protection intersection, *see* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482, 1492–1497 (1970); Kalven, *supra* Note 40, 1965 SUP. CT. REV. at 29–30; Van Alstyne, *Political Speakers at Universities: Some Constitutional Considerations*, 111 U. PA. L. REV. 328, 337–339 (1963).

No doubt a discrimination against all controversial speech—such as we face in these cases—is somewhat less "odious" than a discrimination among different controversial viewpoints on particular issues. But it is a form of censorship just the same.[45] It is a favoritism toward the *status quo* and public apathy and, in these cases, a favoritism toward bland commercialism.[46] Such favoritism flies in the face of the First Amendment, whose central purpose is to protect and promote controversy, "uninhibited, robust and wide-open," on public issues.

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[45] In *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr 430, 434 P. 2d 982, 986 (1967), the California Supreme Court came to the same conclusion as we do on this issue, saying:

"* * * The vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning others. Thus the district's regulation exercises a most pervasive form of censorship.

"* * * [T]he district's policy * * * affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism. No statistical data is required to demonstrate that in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates."

The Supreme Court of Washington specifically adopted this view in *Hillside Community Church, Inc.* v. *City of Tacoma, Wash.*, 455 P. 2d 350, 353 (1969).

[46] Commissioner Johnson commented in his dissent that broadcasters "have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. * * * We have an individual right of access, all right, but only for hucksters of industrial garbage." *Democratic National Committee*, *supra* Note 1, 25 F.C.C.2d at 233.

Moreover, it is by no means clear that a broadcasters' ban on "controversial" advertising does not impermissibly open the door to a *sub rosa* discrimination *among* controversial ideas. The term "controversial" is extraordinarily vague. Some advertisements may not be deemed "controversial"—and may not even be "controversial" for purposes of the fairness doctrine [47]—but may still express ideas, the negative of which would surely be labeled "controversial." [48] Ads for Radio Free Europe or Army recruiting, for example, may be allowed unanswered on the air, while ads calling the notion of the "free world" a sham or ads calling the Army a threat to democracy would be banned entirely. The line between ideological and nonideological presentations is an almost impossible one to draw. All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exhaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest.[49]

[47] See *Banzhaf* v. *F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968): *Green* v. *F.C.C.*, —— U.S. App. D.C. ——, —— F.2d —— (Nos. 24470 & 24516, decided June 18, 1971).

[48] In *Wirta* v. *Alameda-Contra Costa Transit District supra* Note 45, 434 P. 2d at 987, the California Supreme Court made the same point very forcefully, and provided several telling examples:

"* * * A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program."

[49] *See generally* C. Waxman (ed.), The End of Ideology Debate (1969).

Thus the editorial advertising ban, particularly when licensees accept advertising generally, establishes an unmistakable infringing of First Amendment liberties. The Commission and the broadcasters, then, bear a very heavy burden of justification. Whether we require a "compelling" justification, an "overriding" justification, or a "clear and present danger" is relatively unimportant.

VI

It being established that there is a strong and specific First Amendment interest in editorial advertising and that the policies discriminatorily barring such expression work a *prima facie* violation of constitutional principles, we must consider the countervailing considerations raised by the Commission and the broadcaster-intervenors. In order to justify the policy at issue, they must show some very substantial harm that would be caused by acceptance of editorial advertising—a sort of harm great enough to override the First Amendment interests at stake and a sort of harm not already involved in the acceptance of commercial and "noncontroversial" advertising. Only such a showing could convince us that the ban on editorial advertisements is supported by sufficient countervailing values and is not based solely on the content of the ideas conveyed.

The Commission and intervenors have begun from the assumption that our holding for petitioners would deprive broadcast licensees of their highly prized editorial independence and control over their frequencies, giving editorial advertisers a *right* to air time which commercial advertisers do not presently have. They have argued that petitioners seek the right to "grab the mike" from broadcasters' hands.[50] The

[50] Statement of attorney for intervenor Columbia Broadcasting System at oral argument before this court.

result, they say, would be a threefold disaster. First, they foresee "'a return to the chaotic situation of radio's early days'"[51] when too many hands grabbing for too few mikes made successful broadcasting impossible. Second, they argue that compulsory acceptance of editorial advertising would allow a few rich individuals or groups to buy up great blocks of time to purvey views on only one side of important issues, thus grossly unbalancing the broadcast station's treatment of those issues. And third, they point out that broadcasters compelled to accept editorial advertisements on one side of an issue would then be required by the fairness doctrine to accept at least some advertisements on the other side—free of charge if necessary. Provision of such free advertising time, they say would cut into the broadcasters' revenues and might bring financial collapse.

The arguments of the Commission and intervenors fall well short of the mark. The reason is that they have apparently misunderstood the narrowness of the issue here. All that we are considering is the permissibility of a total, flat ban on editorial advertising. All petitioners ask is that broadcasters be required to accept *some* editorial advertising. They do not advocate an absolute right to air their advertisements. As the *Red Lion Court* made clear, there could not be any such absolute right because advertising time, like all broadcast time, is severely limited. *See* text at page 23 *supra*. Under the Communications Act, broadcasters are not "common carriers" obliged to accept any advertising message that is submitted.[52] And peti-

[51] Brief for the Commission in Case No. 245,537 at p. 12.

[52] 47 U.S.C. § 153(h) (1964). The Commission and intervenors argue that this "common carrier" provision would be declared unconstitutional if we were to decide for petitioners in these cases. That, of course, is absolutely incorrect. The Commission

tioners do not argue that they should be. What petitioners do argue is that editorial advertisements should at least be considered and that some should be aired.

Such a modest reform would not substantially undermine broadcasters' editorial control over their frequencies. For broadcasters would retain full latitude to control the content of their programming. Their editorial control over non-advertising time would not be disturbed whatever. All that would be affected is their allocation of advertising time—an area in which *editorial* control over content has never been of major importance. The interest in deciding which advertisements to accept is not as great as in deciding what public issues to cover and how to cover them on news presentations, for example. *See* text at page 20 *supra*. It surely cannot be equated, as the Commission and intervenors suggest, with the interest of law review editors in deciding what articles to publish. *See Avins* v. *Rutgers, State University of New Jersey*, 3 Cir., 385 F. 2d 151 (1967), *cert. denied*, 390 U.S. 920 (1968). A broadcaster traditionally is not nearly as involved in the preparation and editing of advertisements as a law review staff is in the preparation and editing of articles.

Within the affected block of advertising time, neither chaos nor anything approaching chaos would

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and intervenors also point to a part of the Communications Act providing that if a station permits one candidate for office to use its facilities, it must then permit others equal time, but providing also that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate." 47 U.S.C. § 315(a) (1964). This statutory provision squares perfectly with our holding that a broadcaster is not necessarily obliged to provide any time for advertisements, but that if he does sell some advertising time he may not totally exclude editorial advertising.

follow the modest reform at issue. For, again, broadcasters would retain wide-ranging control. It is well established in First Amendment law governing access to forums that "reasonable regulations" may be promulgated and enforced to limit the exercise of free speech.[53] At the least, there may be regulations determining the time, place and manner of speech. They may not be used to stifle speech, but they are absolutely necessary to see that too many groups speaking at once do not drown out one another or trench overly much on the normal uses to which the forum is put by the public in general. The same principle applies to broadcasters' methods for allocating advertising time. All that petitioners condemn here are regulations providing that public issue advertising may be aired "at no time, in no place and in no manner" over the broadcast media.

Clearly, for example, broadcasters are entitled to place an outside limit on the total amount of editorial advertising they will sell. To fail to impose some such limit would be to deny the public the other sorts of programming which it legitimately expects on radio and television. Similarly, "reasonable regulation" of the placement of advertisements is altogether proper. No advertiser has a right to air his presentation at any particular point in an evening's programming. Nor does he have a right to clog a particular time segment with his messages. A relegation of all editorial advertising to non-"prime time" or any other major discrimination in the placement of editorial advertisements would no doubt go too far. But there is still room for broad exercise of the broadcasters' discretion.

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[53] *See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); Note, *supra* Note 15.

We need not define the precise control which broadcasters may exercise over editorial advertising. Rather, the point is that by requiring that *some* such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. The spectre of chaos and "mike grabbing" raised by the Commission and intervenors here is, as petitioners say, a "bogus issue." Broadcasters, after all, have dealt quite successfully with the scheduling problems involved with commercial advertising. We require only that noncommercial advertisers be treated in the same evenhanded way. Although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, drawn from their experience, to suggest that chaos has resulted.

Beyond the mistaken suggestion of administrative apocalypse, the Commission and intervenors have raised a more plausible and important claim, involving the danger that a few individuals or groups might come to dominate editorial advertising time. Of course, the mere fact that wealthy people may use their opportunities to speak more effectively than other people is not enough to justify eliminating those opportunities entirely. It takes more money to operate a magazine or newspaper—or, for that matter, a broadcast station—than to buy a segment of time for an editorial advertisement. Yet we are not reluctant to provide strict First Amendment protection for the operators of magazines, newspapers and broadcast stations. The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided flood of editorial advertisements could hardly be called the "robust, wide-

open" debate which the people have a right to expect on radio and television.

Again, however, invalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups or a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines.[54] For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. *See* text at pages 24–25 *supra*. However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

We are no less confident of its ability to deal reasonably with the final problem it has raised—that relating to licensees' fairness obligations. Invalidation of a flat ban on editorial advertising, of course, leaves the Commission the power to require that if editorial advertisements are accepted on one side of an issue, then broadcasters must also accept at least some advertisements on the other side of the issue, free of charge if necessary. *See Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The result of such a reasonable regulation, however, need not be financial disaster. Indeed, it is incredible that the Commission would enforce a

[54] In the context of regulating demonstrations or picketing, guidelines which limit access because the same or similar groups had already had substantial access would be unusual and perhaps impermissible. However, the interest in maintaining some degree of balance on the broadcast media is particularly great. And "the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra* Note 7, 395 U.S. at 386.

rule so rigid that licensees would be driven out of business.[55] If the obligation to provide some free time for answering editorial advertisements were shown to threaten actual financial harm to particular broadcasters, the Commission could make necessary adjustments.[56]

We conclude that none of the spectres raised by the Commission and intervenors—spectres of chaos, grossly unbalanced programming and financial disaster—is enough to justify a flat ban on editorial advertising. What real problems there are may be dealt with while the acceptance of *some* editorial advertisements is required. The keynote must be a scheme of reasonable regulation, administered by the licensee and guided by the Commission. At least in the past, the Commission has not considered this task so impossible. Twenty-five years ago it decided a case in which a union charged that a broadcaster was violating free speech rights by refusing to sell program time for the airing of controversial views. The Commission stated:

> "* * * The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest. * * *

[55] We note that the Commission's requirement of free time for antismoking was administered generously toward the financial concerns of licensees and, indeed, few broadcasters seem to have been deterred from accepting cigarette commercials as a result. *See National Broadcasting Co., Inc.*, 16 F.C.C. 2d 947 (1969).

[56] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U. L. Rev. 1222, 1249 (1970). We must be somewhat skeptical of the talk about financial disaster. For, according to Commissioner Johnson, television broadcasters at least "*average* a 90 to 100 percent return on tangible investment annually." N. Johnson, How to Talk Back to Your Television Set 65 (1969). (Emphasis in original.)

"* * * No single or exact rule of thumb for providing time, on a non-discriminatory basis, can be stated for application to all situations which may arise in the operation of all stations. The Commission, however, is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest * * *. The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it placed an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

United Broadcasting Co., 10 F.C.C. 515, 517–518 (1945). We agree with those views, and see no reason why the Commission and broadcast licensees should be any less competent in 1971 than they were in 1945. Given a scheme of reasonable regulation, there is no reason why acceptance of editorial advertising should cause any substantial harm or disruption not already involved in the acceptance of other advertising. Therefore, to single out and exclude editorial advertising is to violate the First Amendment of the Constitution.

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VII

On the basis of the foregoing, we reverse the Commission's decision that a flat ban on all editorial advertising is permissible. However, we remand these cases to the Commission for further consideration. On remand, the Commission should develop reasonable regulatory guidelines to deal with editorial advertisements. Petitioners should be allowed to reapply for advertising time; and, unless their presentations are found to be excludable under the Commission's guidelines, their applications should be accepted. Since the issues on which BEM and DNC seek to speak are current and changing, it is essential that regulations be developed speedily and that the affected broadcasters pass promptly upon petitioners' applications to buy time.

In the end, it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial. But we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. That is a small price to pay. For, as the Supreme Court has said, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949).

Reversed and remanded.

McGOWAN, *Circuit Judge, dissenting:* The majority do not hold that petitioner in No. 24,492 is entitled to have its proposed spot announcements carried by

the intervenor-licensee there involved, or that the petitioner in No. 24,537 is assured of being able to buy time for its programs on public issues. What is held is that the Constitution commands that "*some*", but not all, editorial advertising be accepted; and the Commission is directed to embark upon rulemaking to determine how a licensee is to differentiate the "*some*" from the all.

The majority appear to believe that this assignment will not prove difficult. I am not so sure, particularly when I note that the only Commissioner who has perceived the same constitutional requirement as the majority responds to the practical problems by suggesting that sales of a significant proportion of the total broadcast time be made on a first-come, first-served basis, accompanied by a possible suspension of the fairness doctrine. That approach does not seem to me a promising one in terms of the public's right to know.

The difficulties derive, of course, from the physical peculiarity which distinguishes radio and television communication from all other forms, namely, the limited number of frequencies and the impossibility of accommodating all who may wish to be heard over them. This, so the Supreme Court has said in *Red Lion,* makes it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of each individual to speak, write or publish." The majority, in recognition of this fact, do not purport to discern other than an "abridgeable" or "limited" First Amendment right to initiate paid editorial advertising. Petitioners themselves, it is said, may conceivably never be able to insist that their particular advertising be accepted. That will depend upon the rules which the Commission propounds.

The Commission has, at the least, been set a task of heroic proportions, and one whose very complexities

may undermine the premise upon which it is founded. The question is whether the Constitution requires that it be undertaken. I am not convinced that it does. It is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice. Its existence provides a mechanism for implementation of the public's right to know which, by and large, has been effective. Indeed, the loudest voices in criticism of it complain that it has been working too well for the comfort of governmental policy makers in the areas of greatest current concern.

It is hardly the path of wisdom to scrap it for a system in which money alone determines what issues are to be aired, and in what format, even assuming as is likely to be the case, that those issues, whatever they may prove to be, compare favorably with the intellectual content of the great bulk of commercial advertising. The responsibility for informing the public is now squarely on the licensee. That responsibility will only be diluted and obscured by requiring the licensee, against his own better judgment, to accept paid editorial advertising. I do not think the First Amendment requires that result, at least not within the

context of a regulatory scheme which has made provision for the airing of controversial issues of public importance.

Of course it is true that licensees are currently free to accept paid editorial advertising, and some do, subject always to the limitations of the fairness doctrine. It may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of the licensees are being met in the most effective way. The Commission's currently announced purpose to undertake a comprehensive and wide-ranging review of the operation of the fairness doctrine might well include the subject of paid editorial advertising. But, believing as I do that the First Amendment exerts no compulsion to the contrary, I would not order the Commission to undertake that review in a constitutional straitjacket which dictates the result in advance.

APPENDIX B

[Federal Communications Commission Reports]

F.C.C. 70–861

Before the Federal Communications Commission,
Washington, D.C. 20554

IN RE DEMOCRATIC NATIONAL COMMITTEE,
WASHINGTON, D.C.

Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations

MEMORANDUM OPINION AND ORDER

(Adopted August 5, 1970; Released August 12, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT

BACKGROUND—REQUEST AND PLEADINGS

1. On May 19, 1970, the Democratic National Committee (DNC) filed with the Commission a request that the Commission issue a declaratory ruling that "A broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for the solicitation of funds and for comment on public issues." [1]

[1] Comments with respect thereto were filed by the American Broadcasting Company (ABC) on June 11, 1970 and by the Columbia Broadcasting System (CBS) on June 22, 1970 and a statement by the National Broadcasting Company (NBC) was filed on June 22, 1970.

2. DNC seeks a declaratory ruling on these matters because of its desire to purchase time on individual broadcast stations and networks for the purpose of presenting programs and spot announcements of varying duration, some of which would be devoted to the solicitation of funds while others may contain comment on various controversial issues of public importance. The campaign envisioned will, according to DNC, require the expenditure of "thousands of dollars" and thus it seeks assurance that it will be able "to obtain the access to the broadcast media which implementation of the plan demands." It appears that in the latter part of March, 1970, CBS rejected a request by DNC to purchase one-half hour of prime time for the presentation of an issue-oriented program which would have included an appeal for contributions to the Democratic Party. It is said that CBS' position at that time was that it would sell time for political purposes only during election campaigns. DNC also approached NBC and was told that that network would make available prime time for purchase by the Committee for a program presenting the views of the party on important public issues and including a solicitation of funds for the party. It is not clear that DNC approached the ABC network in view of the latter's alleged general policy against solicitation of funds other than for charity and with network approval. By reason of the foregoing and the alleged common policy of individual broadcast stations to decline to sell time for spot announcements or programs for the broadcast of views on controversial issues of public importance or for the solicitation of funds, DNC states that its problem—access to broadcast licenses for the presentation of its programs—can be resolved only through the issuance of the

blanket declaratory ruling described in paragraph 1, *supra.*

3. We believe that the policy matters raised by DNC are, to a substantial extent, appropriate for consideration and that a full statement of our views will provide helpful general guidance for the public and Commission licensees. We, however, do not believe that all of the various matters raised by DNC are susceptible to the declaratory order sought and we cannot at this juncture rule upon every conceivable factual situation which may arise.

4. In support of its request, DNC has set forth some pertinent financial considerations of present-day political campaigning and the development of a narrow rather than a broad-based financial support of political parties.[2] DNC contends that access to mass media, particularly radio and television, is necessary to attract the attention and seek the support of potential small political contributors. It is only in this way, DNC contends, that a healthy political system can function. DNC urges that its proposed broadcast campaign should not be precluded by a variety of differing station and network policies and that the question of access to broadcast media for responsible groups should be subject to a uniform national policy. The

[2] For example, in 1968, $90 million was expended on political use of radio and television (equaling about ⅓ of the total expenditure on political campaigning for the year). See Alexander and Myers, *A Financial Landslide for the GOP*, Fortune, March 1970, pp. 104, 189. Another indicative statistic is the fact that in 1956, only 40% of the contributions to the Democratic Party exceeded $500 whereas the figure had increased to almost 80% in 1968. According to DNC the narrowing of the political contribution base can result in a dangerous concentration of the sources of revenue in special interest groups which, in turn, threatens the entire democratic process.

arguments advanced by DNC are based upon constitutional, statutory and public policy ground.

5. The constitutional argument advanced by DNC is essentially that the Supreme Court's decision in *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, 395 U.S. 367 (1969) reaffirmed the public's First Amendment right to hear contrasting views on issues of public importance and "employed language that would extend to members of the public the right of access to broadcast facilities." DNC argues that the network policies of ABC and CBS represent arbitrary barriers to broadcast facilities contrary to the law as expressed in *Red Lion, supra.* DNC suggests that under the *Red Lion* standard reasonable restrictions by broadcasters are permissible—e.g., limitation of use of broadcast facilities to responsible spokesmen and protection against use of facilities for libelous presentations or those in bad "taste."

6. According to petitioner, the overriding public policy consideration requiring the declaratory ruling is that the public airwaves—the most powerful communications medium in our society—which are used to solicit funds for "soaps, brassieres, deodorants and mouthwashes" should be utilized to solicit funds to enhance the exchange of ideas. DNC contends that regardless of whether the Commission issues the declaratory ruling requested, the refusal of a broadcaster to sell time to DNC should be evaluated adversely to such broadcaster at time of renewal. The reason for this, DNC urges, is the importance of the broadcast media to political expression (*Farmers Ed. and Coop Union* v. *WDAY,* 360 U.S. 525, 529–30 (1959)); the public interest consideration inherent in broadcasters making time available for political broadcasts (*Report and Statement of Policy Re: Commission En Banc Programming Inquiry,* 20 RR 1901 (1960));

the Commission's prior holding that an arbitrary limitation of coverage of an election campaign prior to the campaign was contrary to the public interest (Citing *Homer R. Rainey,* 3 RR 737 (1947); *City of Jacksonville,* 12 RR 113, 180j (1959); and *Loyola University,* 12 RR 1017, 1099 (1956)) and that the Commission's ruling in *Women's Strike for Peace* (letter of November 22, 1965) predates *Red Lion* and, to the extent it conflicts with that decision, is no longer controlling. Finally, DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups, such as DNC, contrary to the First Amendment and *Red Lion, supra,* or that the establishment of such barriers is contrary to the public interest.

7. *Response of the Networks:* In response to the DNC request, American Broadcasting Companies, Inc. (ABC) submitted portions of its "standards and policies" (The complete version has been filed in BAL–5733, Exhibit I–B, Attachment B, Section III). ABC recites its standards relating to solicitation connected with appeals for charity (no solicitation without specific permission of ABC) and appeals related to religious broadcasts (solicitation permitted in prescribed manner not here relevant), but states that its policy is not to sell time for solicitation of funds in other situations, absent special public interest considerations. It is ABC's judgment that DNC's request is concerned with "the continued strength and viability of our two party system" and is thus a "special public interest consideration" justifying an exception to its normal policy of not selling time for solicitation purposes.

8. ABC states that with respect to controversial issues of public importance, there are "dozens" of "responsible entities" who would wish to purchase time to present their views "were we to open the door." ABC contends that it would be "reasonable to anticipate a flood of such requests." Thus, ABC states, it will adhere to its general policy against the sale of time for controversial issue programs and announcements. However, ABC under its "special public interest consideration" standard would ". . . be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis."

a. CBS' lengthy response to the DNC complaint advances three major arguments: (1) that DNC has misunderstood CBS' policies relating to presentation of controversial issues and that CBS' policies insure full and fair presentation of such issues; (2) that a regulatory policy which imposes common carrier obligations on broadcasters would be contrary to the public interest; (3) that there is no constitutional or statutory right to compel broadcasters to carry the DNC programs; and, (4) that such obligation would be contrary to the Communications Act and Commission precedent.

9. With respect to the first major argument, CBS argues that DNC has not alleged violation of the fairness doctrine but rather seeks to take presentations of controversial issues away from the control and supervision of the licensee. CBS states that if licensees were required to permit the purchase of air time for the presentation of views on controversial public issues, the nature of broadcasting would be radically altered to the detriment of fair, objective and balanced information available to the listening

public.[3] CBS has followed a policy of refusing the sale of broadcast time for presentations of controversial issues in favor of providing "significant opportunities" for such discussions without charge to proponents of various viewpoints through news and information broadcasts. To sell time for presentations on public issues, argues CBS, would result in the preemption of the limited broadcast frequencies by those with strong financial resources which would "necessarily distort the manner in which issues were presented" to the public. CBS asserts that under its present policies, it provides a "high proportion of direct presentations of views" by "the actors in the events of the day" and thus, aside from fully informing the public of differing viewpoints on controversial issues, also provides an opportunity for those holding differing viewpoints to present their own views. These direct presentations, CBS notes, are part of its overall effort to inform the public fully and fairly and are not permitted to become an instrument of "partisan advocacy." The First Amendment, CBS argues, is primarily concerned with the right of the public to be informed—as opposed to the right of the public to speak or to be heard.

[3] CBS asserts that it has served the public by presenting issues and viewpoints within a balanced program schedule utilizing newsworthiness as the sole criterion. CBS emphasizes the growth of public affairs and news presentations during 1968–69 v. 1956–57—e.g., total hours of news and public affairs broadcasting—1,354 v. 675; prime presentations—192 v. 34; regularly scheduled hard news 6:00 p.m.,—11:00 p.m., 338 v. 130; and total hours of news documentaries 100 v. 37. In addition, CBS also presents a comprehensive exhibit to demonstrate the coverage given one of the major issues of the day by CBS and WCBS–TV—the Indochina War and domestic reaction to it. This Indochina exhibit includes a minute and second analysis of CBS' total coverage of this issue and runs over 100 pages.

10. CBS' policy against sale of time for the presentation of views on controversial issues does not apply to broadcasts on behalf of political candidates or ballot propositions. This exclusion is based upon CBS' belief that the intent of Section 315 is to facilitate the discussion of political issues by legally qualified candidates; such political broadcasts may include a direct appeal for funds so long as CBS is not involved in the collection or handling of such funds. CBS also states its intention to permit the purchase of a special category of spot announcement (up to one minute in length) for the purpose of political fund raising which need not be on behalf of political candidates or ballot propositions.

11. With respect to the common carrier argument, CBS states that such a policy would be contrary to the public interest because partisan presentations would diminish the time available for other news, sports and entertainment programs and would result in an "auction" to the highest bidder to determine what issues will be discussed and how such discussion will be conducted. Moreover, CBS queries, would the broadcaster then be responsible for restoring the balance? How would a network choose among competing bidders if not enough time were available for all? What standard is to be used to determine "responsible entities?" CBS argues that DNC's proposal would divest the licensee of responsibility for controversial issue programming and would ultimately require the Commission to make judgments as to the specific programs which are presented or rejected.

12. The legal arguments which CBS advances—i.e., that DNC's request is without constitutional or statutory basis, that Commission compulsion to carry DNC's programs is barred by the Communications Act, and that the action which DNC requests of the

Commission is contrary to the Commission's own policy and precedent—are based primarily upon the assertion that no particular person or group has the right to speak over broadcast facilities and that to assert such a right would ultimately require the Commission to assume the role of a censor or arbitor of specific programs, contrary to its long-established policy of avoiding such governmental involvement. CBS asserts that the *McIntire* case[4] stands for the proposition that "broadcasters, though licensed by the Commission and subject to its valid regulations, are not publicly owned facilities, and there is no First Amendment right to purchase time on radio or television stations." CBS further asserts that nothing in *Red Lion*[5] indicates that *McIntire* is no longer good law or that, apart from Section 315, there is any legal obligation for broadcast licensees to sell time. Rather CBS says, *Red Lion* merely sustained long-standing Commission policies which are wholly in consistent with DNC's request.

13. To accede to DNC's request, CBS argues, would violate Sections 3(h) and 326 of the Communications Act, which taken together establish that the licensee—not the Commission—is to exercise the power of program selection. The right of *personal* reply to material previously selected for broadcast is limited to equal opportunity for political candidates, replies to personal attacks and replies to station political endorsements. CBS contends that the legislative history of the Communications Act supports its assertion that the statutory scheme envisions a system in which the

[4] *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (3rd Cir 1945) *cert. den.* 327 U.S. 779 (1946).

[5] *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 395 U.S. 367 (1969).

broadcaster is left with the initiative of assuring that programs presented are in the public interest.

14. Finally, CBS asserts, DNC's request is "fundamentally inconsistent" with the concept of licensee responsibilities and specifically, contrary to the Commission's prior holdings that "the Commission has no power to require a broadcaster to carry or refrain from carrying any particular program, or to prescribe the content of any program presented over the air." Letter to *Women's Strike for Peace,* November 22, 1965.[6] Nothing in the *Red Lion* decision, *supra,* states CBS, indicates that the Court contemplated the abandonment of "traditional FCC fairness policies" and the adoption by the FCC of a common carrier theory as set forth in the DNC request.

15. NBC has no policy which would prevent the purchase of program time envisioned by DNC or the solicitation of funds for the party during such a program. DNC states that it is not clear whether NBC would permit short spot announcements designed for the solicitation of funds for a party, but this simply points up the desirability of a concrete factual situation—namely, of DNC making a specific request, instead of the general, more vague approach which it has taken here.

DISCUSSION

Part I. The right of responsible entities to purchase time for comment on public issues

16. The DNC petition raises two separate questions: (i) the asserted right of political parties to purchase

[6] To support this proposition, CBS also cites *McIntire* v. *Wm. Penn Broadcasting Co., supra;* 1949 *Editorializing Report,* 13 FCC 1246; 1960 *Report and Statement of Policy in the En Banc Programming Inquiry,* 25 Fed. Reg. 7291 (August 3, 1960); and letter to *Judy Collins,* March 24, 1970.

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broadcast time to solicit funds, and (ii) the asserted right of responsible entities to purchase time for comment on public issues. In this Part I, we deal with the second question.

17. That question goes to the heart of the system of broadcasting which has developed in this country—i.e., the licensing of private entities under the public interest standard. While the issues raised by the DNC petition are fundamental, they are not open. They have long been settled adversely to the DNC position, by the statute, by the Commission, and by the Courts. We shall discuss the present system and its statutory support, the relevant precedents, and the policy considerations.

18. The system which Congress has evolved has been described in full in the landmark decisions in this field—*NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. 367 (1969). We shall not repeat that discussion here. It is sufficient to note that it is based upon the unique nature of radio—that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." (*NBC* v. *U.S., supra,* at 226.)[7] To resolve the chaotic situation which had resulted, Congress decreed a system of licensing private entities for short terms, upon the condition that their operations serve the public interest. It is thus incumbent upon these public trustees to fashion schedules which do meet the needs and interests of the public. To do so, the broad-

[7] The Court recently reaffirmed this vital distinction in *Red Lion* (*supra*, at 388): "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."

caster must allocate programming among the several categories (e.g., entertainment, instruction, news, public affairs) and, within those categories, must choose among the many competing requests for air time. See *Report on Editorializing,* 13 FCC 1246, 1247–48 (1949). However, there is one special obligation which the Commission has stressed—that broadcasters must ". . . devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station" (*id.* at p. 1249). Indeed, the Commission has stressed that it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. *Ibid., Storer Broadcasting Co.,* 11 FCC 2d 678. It follows that the Commission can and must require the achievement of that allocation purpose by its broadcast licensees. See Section 303(b); *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra* at p. 394. In short, as stated by the Court in *Red Lion, supra,* at p. 394, the licensee is ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."

19. The Commission has consistently made clear that with some exceptions not here pertinent, the licensee has discretion in discharging that obligation. Thus, in its basic *Editorializing Report,* the Commission stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of

> presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. . . .

This same policy is set out in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416; cf. also 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). In line with these general precepts, we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.[8]

20. While the licensee thus has considerable discretion in discharging "the twofold duty" stated in *Red Lion, supra,* at 377—to devote a reasonable amount of time to public issues and to do so fairly—that discretion must be exercised consistent with the public interest standard. The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views be-

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[8] *Dowie A. Crittenden*, 18 FCC 2d 499 (1969); *Mrs. Margaret Z. Scherbina*, 21 FCC 2d 141 (1969); *Democratic State Central Committee of California*, 19 FCC 2d 833 (1968); *Boalt Hall Student Association*, 20 FCC 2d 612 (1969); *Mrs. Madalyn Murray*, 40 FCC 647 (1965).

cause of his private ends or beliefs. As a public trustee, he must present representative community views and voices on controversial issues which are of importance to his listeners (*Red Lion, supra,* at 389, 390, 394). This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open." *New York Lines Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964); see also *Red Lion Broadcasting Co. Inc.* v. *F.C.C.,* 395 U.S. 367, 392 (n. 18) (1969); *Storer Broadcasting Co.,* 11 FCC 2d 678 (1968); *Anti-Defamation League of B'nai B'rith,* 9 FCC 2d 190, 191 (1966), affirmed *Anti-Defamation League* v. *F.C.C.,* 403 F. 2d 169, 170 (1968) (C.A.D.C.), *cert. den.* 394 U.S. 930 (1969). In sum, as stressed in the *Editorializing Report, supra,* at p. 1249:

> It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

See *Red Lion Broadcasting Co. Inc.* v. *F.C.C., supra,* at p. 390:

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

21. With this as background, we turn to the DNC petition. That petition seeks to overrule the above policy and to require licensees to sell time to any responsible entity to comment on a public issue. Using

the CBS response as an example, we note that it would require a holding that CBS' policy in this area is inconsistent with the public interest, because although it recognizes its obligation to devote a reasonable amount of time to controversial issues of public importance (and has submitted a showing of its increasing efforts in this respect, including during prime time hours), and to do so fairly by providing ". . . significant opportunities for such [broadcast] discussion without charge to partisans of various viewpoints in [its] news and information broadcasts" (p. 3, CBS Response), CBS will not sell time for the expression of viewpoints on public issues (with the exception of political broadcasts). It is important to bear in mind that DNC has not alleged that CBS or any other licensee has failed to discharge the above-noted obligations of the fairness doctrine. Thus, what is involved in the DNC request is a question whether there is a right of access to broadcast facilities by "responsible entities" over and beyond the fairness doctrine right of the public to be informed.

22. The DNC position—that the licensee, upon request, must sell time to any responsible entity for comment on public issues—runs counter to the statutory language and the legislative history. That history shows that Congress specifically debated and rejected the idea of the licensee being required to act as a common carrier with respect to transmission of comment on public issues. See Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 4; 67 Cong. Rec. 5560–5561, 12501–12504. The Act reflects this. Section 3(h) states that a broadcaster shall not be deemed a common carrier. Section 315(a) sets out the pertinent statutory standard—that the licensee must operate in the public interest and must afford reasonable opportunity for the discussion of conflicting viewpoints on controversial

issues of public importance. This language cannot be squared with the DNC position; had Congress adopted such a posotion, the statutory prescription would have been entirely different (e.g., . . . "including the sale upon request of time to responsible entities for presentation of a viewpoint on controversial issues of public importance"). The legislative history makes clear that the language of Section 315(a) is a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1609, 86th Cong., 1st Sess., p. 5 (1958))—that is, as the legislative history shows, the principles set forth in the basic *Editorializing Report*. That this is the statutory scheme is further shown by the consideration of the second sentence of Section 315(a)—that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate." The purpose of this provision is to make clear that the broadcaster is not a common carrier as to political broadcasts—that he may exercise discretion as to the time to be afforded broadcasts by candidates. See *Memorandum of F.C.C.*, Hearings before the House Subcommittee of the Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess. on H.J. Res. 247, pp. 84–90 (1963) (to the effect that while the licensee has discretion, he cannot adopt a policy of not devoting a reasonable amount of time to political broadcasts). It would make no sense to hold that the licensee has discretion whether or not to sell time for the most important controversial issue programming of all—the political broadcast by the candidate (see discussion within as to the preferred position of such programming), but has no such discretion as to other controversial issue programs (e.g., by a candidate's supporters; by partisans of a particular viewpoint on some public issue).

23. The administrative and judicial precedents reflect the statutory scheme. The Commission's pronouncements are long established and consistent. See, e.g., *Report on Editorializing,* 13 F.C.C. 1246, 1249 (1949); 1960 *Programming Statement; Women's Strike for Peace,* November 22, 1965. The court cases are to the same effect, *McIntire* v. *William Penn Broadcasting Co.,* 151 F.2d 597, 600–601 (C.A. 3), *cert. den.,* 327 U.S. 779; *Massachusetts Universalist Convention* v. *Hildreth and Rogis Co.,* 183 F.2d 497, 501 (C.A. 1). DNC argues that these cases are no longer relevant in light of the Court's decision in *Red Lion,* and that that decision establishes the correctness of its position. We do not so read *Red Lion.* The Government's brief pointed up the nature of the licensee's responsibility under the *Editorializing Report, supra,* at pp. 14–17, 31–32, and the Court recognized the report "as the principal summary of [the Commission's] *ratio decidendi* in cases in this area" (p. 1251). The Court at the outset noted "the twofold duty" imposed by the *Editorializing Report* and the manner in which the obligations under the general fairness request differed from those under the personal attack corollary (pp. 371–379).[9] The Court's decision is based, we believe, on this foundation. The thrust of that decision is not that the broad-

[9] Thus, the Court stated: "These personal attack and political editorializing obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attached party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine." *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, 395 U.S. at 378.

cast licensee is a common carrier, required to sell time to all comers on public issues, but rather that he is a public trustee—a proxy—who must present *representative* community views and voices on controversial issues. The Court's decision thus stresses the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The private censorship by broadcasters which the Court rules out is that which would prevent the presentation of representative community views or voices.

24. There are strong policy arguments in support of the Congressional scheme. We have noted that broadcasting is inherently not open to all (paragraph 18, *supra*). That is true equally with respect to the common carrier access approach urged by DNC. The result could well be a return to the chaotic situation of radio's early days. Since the broadcast medium is a limited one, the amount of time to be devoted to public affairs—as against the other needs and interests of listeners—is also limited. This balance between the categories could be drastically skewed by a requirement that the broadcaster must make available time slots for the discussion of a controversial issue. Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent—by the person or group which ". . . has the financial resources and interest to purchase sustained access to the mass communications media . . ." (*Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (C.A.D.C. 1968), *cert. den.*, 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the

issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues. But we believe that such allocations of limited time are to be made on the basis of the *public* interest—not that of any private group, however powerful or affluent. Further, the public trustee would lose control over the important aspect of the manner in which the public is to be informed. We recognize that in some instances short spot announcements may serve a useful purpose in this area (see *infra,* p. 17). But we have also pointed up the limitations as to many issues of this manner of informing the public. See e.g., Hearings before the Senate Commerce Committee, H.R. 6543 (1969), pp. 142–143; *Voters Time Rept.,* p. 15. A licensee which reasonably made the judgment that an issue was too complex to be discussed in a 30-second commercial—that "hawking" the issue like a soap did not serve the public interest—would find that judgment frustrated by the DNC policy; it would be required to sell the spots and ordered to make time available to opponents on a similar basis. See *Cullman Broadcasting Co.,* 40 FCC 516 (1963); *KING Broadcasting Co.,* 10 FCC 2d 968, 970 (1967).

25. This last point—the application of *Cullman*—merits further discussion. The *Cullman* principle was developed to deal with the situation where the broadcaster has sold time to one side to present its views, has not presented or made plans to present the contrasting viewpoints, and rejects programming which he deems suitable to present those viewpoints, unless the party offering such programming will pay for its presentation. We held that the licensee could not properly insist upon payment in such circumstances. The paramount public interest, we stressed, is the

right of the public to be informed. The licensee has adjudged that an issue is of importance to its area by presenting the first viewpoint; that being so, the public's right to hear the other side cannot turn on whether the licensee received money.[10] This approach perfectly fits the public trustee concept. It does not fit a common carrier approach. For under the latter system, the licensee has to sell the time, no matter the amount, and then finds himself having to afford free time to the proponents of the contrasting viewpoint, again no matter what the effect on his ability to serve the public interest. Further, under a common carrier approach, each side is usually relegated to purchase, with no *"Cullman"* rights. We believe that *Cullman* is a correct and sound doctrine which ties in with the public trustee concept and best serves "the public interest in the larger and more effective use of radio" (Section 303(g)).

26. In connection with the above discussion, we should note that there is of course no Commission policy thwarting sale of time to comment on public issues. Licensees are free to do so, with the caveat that the fairness doctrine, including the *Cullman* aspect, must be observed. The critical issue is whether the licensee, to discharge either of "the twofold duties" noted at the outset—to devote a reasonable amount of time to issues of public importance and to do so fairly—must sell some time to comment on public issues. The foregoing discussion makes clear that the licensee need not do so. If, for example, CBS chooses not to sell time but rather to fulfill its obligation on a sustaining basis in the manner disclosed in paragraph 9, *supra* (e.g., to provide significant

[10] For the different application of *Cullman* to the political broadcast field, see *Letter to Nicholas Zapple*, FCC 70-598 (1970).

free opportunity for partisan presentations), that choice is within its discretion. What is crucial is that the licensee does meet its obligation "to operate in the public interest and afford reasonable opportunity for discussion of conflicting views on issues of public importance." (Section 315(a).)

27. Finally, we point out that the Commission does recognize the importance of fostering "a multitude of voices" in the discussion of public issues. Thus, it sought to promote the growth of FM radio, UHF television, and noncommercial educational broadcasting, and is seeking to promote a new technology which can make a most significant contribution in this respect—cable television. Because of the potentially great number of channels, cable opens up the possibility of common carrier channels, public access channels, etc. See Notices of Proposed Rule Making In Dockets Nos. 18397A and 18874, 23 F.C.C. 2d——, released July 1, 1970. But the policy in the broadcast field is shaped by the inherent characteristics of that field. As we have shown, that policy is based on the right of the electorate to be informed, and is an issue-oriented "right of access," not the right of any individual to access.

28. At the risk of some repetition (see particularly pars. 24, 25), we believe it appropriate to take up the position set forth in the dissent of Commissioner Johnson.[11] We cannot accept the position of the dissent that the course we are taking conflicts with the First Amendment. As we understand it, the dissenting opinion of Commissioner Johnson urges that the operation of a broadcast station is analogous to the

[11] That dissent is addressed also to the Commission's decision in the *BEM* case, F.C.C. 70 ——, issued this day. Our discussion here is of course equally applicable to the *BEM* case, and we so stated in that opinion.

administration of a public facility, such as a park or a municipal bus (whether publicly or privately owned), and that once the facility is appropriately opened for the expression of views on public issues or commercial advertisements, it is a denial of First Amendment rights to reject or censor a proffered announcement constituting constitutionally protected speech by one willing to pay the customary rate, if there is ordinarily a charge. While we need not disagree with the premise that the Commission's regulation of broadcast stations under the Communications Act must meet First Amendment standards, we think that the dissent—because it ignores established First Amendment policy in this area—posits a nonexistent individual right of access to broadcast facilities.

29. First of all, to the extent that the dissenting opinion urges a near-absolute right of any person who has the money to buy time, it would create a common carrier situation which Congress after due deliberation specifically rejected in Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). Apparently recognizing this collision with the statute, the dissent states (page 25) that Congress and the Commission have permitted a form of private censorship which is inconsistent with the First Amendment. We must note in this connection that it is beyond the power of an administrative agency to declare its governing statute to be unconstitutional. *Central Nebraska Pub. P. & I. Dist.* v. *Federal Power Commission,* 160 F. 2d 782, 783 (C.A. 8, 1947). However, if that infirmity did not exist, we would have no constitutional qualms about our present decision.

30. In its assertion of the unconditional (except for suggested reasonable limitations on time, place and

manner)[12] right to buy time, the dissenting opinion takes no account of the basic, constitutionally valid policy of the Communications Act that because radio is "inherently not available to all," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226, there is a public duty adhering to the acceptance of a license to give adequate coverage to public issues which reflects opposing viewpoints, if necessary at the broadcaster's own expense. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367. See also 47 U.S.C. § 315(a). As *Red Lion* makes clear, the licensee is a fiduciary with obligations to present views and voices which are representative of his community. It is through this basic approach that the paramount right and interest of the public to be fully informed is protected. The operator of a public park or transit system has no such obligation; if the analogy offered by the dissent were valid, a broadcaster would be free to present only one side of every public issue so long as he did not reject any one who chose to speak. There would be no obligation to present the other side, let alone the obligation imposed by *Cullman Broadcasting Co.,* 25 R.R. 895 (1963) to put on an opposing view without charge. It is clear, therefore, that the analogy to other types of facilities that carry speech to the public, or furnish a place for speech, is fatally faulty.

31. Furthermore, the dissent fails to be adequately specific in detailing the types of limitation which it would permit as inroads to the general principle of an absolute right of access. Presumably, the licensee would not have to turn over all of its time on a first come, first served basis, for this would mean that the issues discussed and the persons speaking would be

[12] The dissent also mentions quality standards, an exception which is hardly consistent with its argument.

governed entirely by money. But even if the dissent would permit the licensee to specify amounts of time and issues, the suggested system would appear to be unsound. First of all, the individual right upon which the whole dissent is premised would largely disappear. No person would have the right to discuss an issue of his choosing, at the time of his choosing, and for a duration of his choosing. How could the licensee validly determine that a particular speaker could effectively make his argument in 10 minutes, 5 minutes or a 30-second spot? Yet such determinations would be required. We have said that a licensee may reasonably determine that a position on a complex issue should not be peddled like soap in a few seconds. The dissent would presumably upset that ruling—to what purpose? Beyond these questions is the more important difficulty that depriving the licensee of the discretion to choose representative spokesmen on controversial public issues [13] would lead us to a first come, first served platform dominated by financial considerations—the very result the dissent seeks to avoid and something the Supreme Court has already stated to be undesirable in *Red Lion.*

32. In short, we think the present system of regarding licensees as trustees, *McIntire* v. *William Penn Broadcasting Co.,* 151 F. 2d 597 (C.A. 3, 1945), *cert. den.* 327 U.S. 779, with a duty to present constrasting viewpoints through representatives spokesmen, is constitutionally sound and of greater public benefit

[13] There could be a case where the licensee's policy in this area would be arbitrary (e.g., where he covers the issue, and in announcements of a few seconds duration, and then refuses to let others discuss the issue on the basis). No such case is or has been before us. We have ruled on the assertions of DNC and BEM of general entitlement to time to discuss public issues. Our holding is in that context.

than the concept of an individual right of access, which as we have shown has great drawbacks in the broadcast field.

Part II. The right of political parties to purchase broadcast time to solicit funds [14]

33. In view of the positions now taken by the three major networks (the only parties whose policies were singled out by DNC were CBS and ABC), no extended discussion is called for in this Part.

34. NBC has stated that it has no policy against the sale of time to a major national political party, to be used for the solicitation of funds for the party, including during non-campaign periods. CBS initially rejected the DNC request since it occurred outside an election campaign, but has now revised its policy to permit the purchase during any period by a political party of spot announcements (not to exceed one minute in length) designed to solicit funds for the party. ABC set forth its policy that "absent special public interest considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds" (p. 3, ABC of June 10, 1970, to William B. Ray), but then stated:

> The continued strength and viability of our two party system are of vital importance, ABC has emphasized in recent Congressional hearings the importance of a wider base for political contributions—small sums from millions of Americans rather than large contributions from a few.
>
> * * * * *
>
> Because the strength and viability of the

[14] While the DNC petition is couched in terms of selling time to "responsible entities" to solicit funds, the petition before us is that of a political party and our discussion here is confined to purchase of time by such parties for solicitation of funds.

> major political parties are vitally important, ABC would be prepared, consistent with its other obligations, to accept such orders for time from major political parties as can be accommodated on a reasonable basis. At the same time, we proposed to continue our general policy against the sale of time for controversial issue programs and announcements and solicitations for funds, absent special public interest considerations.

ABC then invited the Commission to address itself to its proposed treatment of the case.

35. We concur in that treatment. We note that Congress has singled out the presentation of the political broadcast as a particularly important aspect of the licensee's public interest obligation. See Section 315 (a), *Farmer's Union* v. *WDAY*, 360 U.S. 525 (1958) (citing F.C.C. cases); F.C.C. Memorandum on Second Sentence of Section 315(a), Hearing before Subcommittee of Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84–90. It also requires no discussion to establish that political parties are an integral part of our democratic process and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. See *Voters Time Rept.,* The Twentieth Century Fund (1969), pp. 45–47.

36. In a 1963 ruling, *Letter to Lawrence M. C. Smith,* 40 F.C.C. 549, we sought to encourage the presentation of free broadcast time for this purpose stating:

> First, we recognize that the announcements described by you constitute an effort to achieve the worthwhile and commendable goal of broadening the base of political contributions. The importance of this effort was recently emphasized when, on May 29, 1962, President Kennedy transmitted to the President of the

Senate and the Speaker of the House of Representatives legislation designed to carry out five of the important recommendations contained in the "Report on the President's Commission on Campaign Costs." In his letter of transmittal, the President stated, among other things:

"In these days when the public interest demands basic decision so essential to our security and survival, public policy should enable presidential candidates to free themselves of dependence on large contributions of those with special interest. Accordingly, it is essential to broaden the base of financial support for candidates and parties. To accomplish this, improvement of public understanding of campaign finance, coupled with a system of incentives for solicitation and giving, is necessary."

Furthermore, your proposal has an objective, in common with the broad policy underlying the "fairness doctrine"—the right of the public in a free society to be fully informed as to controversial issues of public importance, including those involving political parties and candidates. See paragraph 6 of enclosed *Editorializing Report.*

Second, the question whether to present such announcements is one for the licensee, who is faced with many competing requests to allocate time for public service announcements. The Commission of course expresses no opinion as to how that time should be allocated. But the announcements in question should not be rejected upon the sole ground that the licensee would have to be fair in their presentation. *Lawrence M. C. Smith,* 25 Pike and Fischer Radio Reg. 291, at 293 (1963).

37. Whether such time is afforded on a free basis is a matter for the judgment of the licensee. The issue here is whether the licensee may adopt or follow arbitrary policies with respect to the sale of broad-

cast time to significant political parties for the solicitation of funds. Thus, the prior CBS policy of confining such sales of time to election periods would appear arbitrary, since the need for the widest possible financial support for political parties is not confined to such periods; and indeed we note that CBS offered no reason for such a distinction.

38. In this connection, we note that affording time for such solicitations does not raise any offsetting considerations, because of the combined force of a number of factors:

(i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees;

(ii) This would appear particularly to be an area where the relatively short announcement, limited very largely to fund solications, is both effective and appropriate.[15]

(iii) There is no problem under *Cullman.* For, in this regard the principles set forth in *Letter to Nicholas Zapple,* FCC 70-598 (1970), would govern.

CONCLUSION

39. In view of the foregoing, the request of the DNC and ABC for a declaratory ruling IS GRANTED to the extent reflected in Part II and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

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[15] Of course, the licensee may exercise judgment as to how to present these solicitations for funds, and can afford more extensive programming time, if he so chooses. Indeed, we stress again the considerable discretion of the licensee, consistent with the obligations of the fairness doctrine, as to the various facets such as number, placement, length, etc. *Cf. Lawrence M. C. Smith,* 40 FCC 549.

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Concurring Statement of Commissioner Kenneth A. Cox

I concur. The essence of the holding as to sale of time for the discussion of controversial issues—as of the *Red Lion* and *Cullman* cases—is that a broadcaster *must* devote substantial time to the presentation of news and public affairs programming dealing with the principal issues of his area. He can sell time for this purpose—subject to *Cullman*—but we will not require him to do so against his wishes. Or he can—and this is generally to be preferred—give time for both sides. I *assume* here that the networks have given, or will give, adequate time for discussion of the key partisan political issues of our time. If not, then we must hold them to that obligation.

I therefore concur generally in this action, except for the matter contained in Paragraph 27.

Dissenting Opinion of Commissioner Nicholas Johnson

[an opening parable]

[Once upon a time there was a nation as great in ideals as industrialization. It had business everywhere—and unsurpassed military might to protect it. And yet its greatest strength was its foundation. For this nation professed to be governed by the consent of its citizens. To insure the successful functioning of this unusual government, free education, libraries, and full information were provided in order that its 200 million governors, through wide-open debate, might govern wisely. As the years slipped by the people spent more and more time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks and reading handbills on the streets. And yet the great

issues, and the need for informed governors, continued. And thus it was that the great debate about the great debate began.]

[Everyone had his own theory how to get the democratic dialogue back to the people (who were all home watching their television sets). Some advocated letters, petitions, press conferences, and picketing, but they didn't seem to be successful. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the showing of such activities it was usually possible to present a short message on television (however distorted) about the merits of the issue at hand. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, and ask them for the time to present our concerns—and even pay them." They were jeered by the crowd, but not deterred. The broadcasters politely explained that there was no longer any room at their inn for the discussion of public issues—like war, and life, and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of manipulating consumers to buy useless and harmful products. And yet these patient and patriotic students, businessmen, and Senators still did not give up. They continued to preach the doctrine of "working within the system." "The government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the FCC. . . .]

The Democratic National Committee (DNC) has asked the Commission for a declaratory ruling requiring broadcasters to supply two types of "access" to their radio and television facilities: first, the right to purchase, at current commercial rates, short "spot an-

nouncements" to solicit funds for political purposes; second, the right to purchase longer segments of airtime for presentation of political programming on important national issues. The majority, so far as I can determine, has equivocated on the first request, and denied the second. I dissent.

I

We should start with a few fundamentals. The great concept of our Constitution, embodied in the First Amendment, was that our democratic government would endure only so long as its citizens and their elected representatives had the leisure to think, the right to speak, and the freedom to criticize their government. As Supreme Court Justices Holmes and Brandeis understood, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and that in a government of free men, "the deliberative forces should prevail over the arbitrary." See *Abrams* v. *United States,* 250 U.S. 616 (1919) (Holmes, J., dissenting); *Whitney* v. *California,* 274 U.S. 357 (1927) (Brandeis, J., concurring).

The issues we grapple with today, therefore, pose a crucial question. How can we create a free and open "marketplace of ideas" over the radio and television medium in which citizens, and their elected representatives, can discuss the great issues that weigh upon our nation?

The second fundamental is equally important. For speech to be free, there must be both a *forum* for communication—whether it be a public park, school, town hall meeting, soap box, leaflet, newspaper, magazine, or radio or television frequency—as well as *procedural rules* to keep order, to make it possible for all (or most) to speak in turn, and be heard, in that forum. Perhaps the greatest legal distinction to be

drawn in political and free speech theory is that between restrictions on the *content* of speech (which the First Amendment flatly prohibits), and regulations for the manner of speech (which the First Amendment not only permits but requires). As this nation's concept of speech derives principally from the model of the town meeting, I quote Professor Alexander Meiklejohn, one of the greatest champions of First Amendment freedoms, as he describes the town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses, health, external defense, and the like. . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of public discussion, would be wholly ineffectual unless speech were thus abridged. . . .

Meiklejohn, *The First Amendment Is An Absolute,* 1961 Supreme Court Review 245.

Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control.

There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them.

The analogy to broadcasting should be clear. Yet, we have permitted a system of broadcasting to develop in this country in which private licensees serve, not only as "moderators" for the electronic forums of communication, but as all the "speakers" as well. As the majority states, our limited frequencies require someone to serve as "public trustees." No one would deny this need for a "trustee" system. But that is not the issue. The issue is whether that "trustee" must control *all* the available time, or whether policy and the First Amendment require him, in a manner consistent with his other duties, to turn over reasonable portions of that time directly to the people.

In many ways, broadcasters have resolved this issue themselves. For *they* have created a system in which immediate access is granted to one, privileged class of applicants: the commercial peddler of goods and services. As the system now operates, any person wishing to sell products—toothpaste or "feminine deodorant spray," for example— has direct, personal and instant access to television. He can present his message, in the form he wishes—not in terms of "issues" (the general benefits of toothpaste or deodorant), but in terms of individual products. He is not forced to rely upon a "trustee" to argue the cause of his product for him under some principle of the fairness doctrine—an occasional mention on the evening news, or a Sunday afternoon talk show. He does it personally and directly.

No, our Rules of Order for radio and television are fantastically skewed. We have an individual right of

access, all right, but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate "trustee," appointed by the government, to speak for him. But the corporations that have largely contributed to these social ills can defend their wares directly. With the help of Congress and the FCC, the broadcasting industry in this country has built perhaps the most beautiful, efficient, and effective "marketplace of ideas" ever conceived and executed. The industry finds it most profitable, however, to use that marketplace only for the sale of products—not the robust, wide open debate of a free society. And the FCC finds this in "the public interest"!

II

The majority has addressed the first issue—the right to solicit funds via short announcements—in ambiguous fashion. Stating that the three networks have grudgingly announced their willingness to accept such announcements, the majority responds: "We concur in that treatment." (Par. 30.) But how does this "concurrence" rule on the request before us—namely, that broadcasters be *required* to adopt such policies? The majority hints that a denial of such time to political parties outside normal election periods would appear "arbitrary," but does not explain why, nor detail the consequences of such arbitrariness. Because, however, the majority states that solicitation announcements are "appropriate" in this area, I conclude that they make the networks' recently adopted policies binding on them.

In a companion case to this decision, *Business Executives Move for Vietnam Peace* (*BEM*), FCC 70–860, Aug. 6, 1970, I have stated in detail my position that a broadcaster cannot accept commercial ad-

vertisements, yet reject advertisements which are political in nature. I believe the principles there stated are directly applicable to advertisements soliciting funds for political parties. I will not repeat them here, but merely incorporate them by reference. For reasons detailed in that opinion, I concur in the majority's decision to require licensees to accept advertisements by political parties soliciting funds.

I dissent, however, to the majority's position that broadcasters should not be required to offer time for short announcements to *all* persons for *any* purpose. As I have argued in my *Business Executives* opinion, once a licensee opens his forum to the presentation of commercial views, he cannot then close it in a discriminatory fashion—accepting some commercial views and political solicitations, but rejecting all others. I point out only that the Commission's partial waiver for the DNC to permit it to purchase fundraising spot announcements only increases the arbitrariness and discrimination involved in denials of access to political parties for short announcements on current issues, or announcements by groups or individuals either soliciting funds or stating positions on national problems.

In *Wirta v. Alameda-Contra Costa Transit District,* 434 P. 2d 982 (Cal. 1967), for example, a public transit company sold advertising space in its buses for commercial products, but refused to accept an advertisement by Women for Peace, which simply stated:

> "Mankind must put an end to war, or War will put an end to mankind."—President John F. Kennedy . . .

Stating that the political "advertisement" was clearly protected by the First Amendment, the court flatly ordered the company to accept the advertisements for display.

> [A]dvertising is an acceptable and effective means of communication. A regulation which permits those who offer goods and services for sale . . . access to such forum, while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld.

Wirta, supra, at 990. The "vice" of censorship lay in "choosing between classes of ideas," accepting commercial ones and banning all others. Every other court faced with the same issue has followed this position. See, *e.g., Hillside Community Church, Inc., v. City of Tacoma,* 455 P. 2d 350 (Wash. 1969); *Zucker v. Panitz,* 299 F. Supp., 102 (S.D.N.Y. 1969); *Kissinger v. New York City Transit Authority,* 274 F. Supp. 328 (S.D.N.Y. 1967). The application of this arm of the law to broadcasting is relatively new and as yet undeveloped and unapplied. But see *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). I have attempted to show that these cases clearly apply to broadcasting in my *Business Executive* opinion.

The lesson of these cases is clear. The Government could not, for example, allow persons selling products to speak freely in public parks, but bar those opposing the war or require them to "speak" through an interpreter or "trustee" appointed by the Government. No court in the land would tolerate such blatant discrimination. Yet the majority permits this sort of discrimination to occur every day in our nation's electronic "public parks." Although we do not have the question before us, a broadcaster might not have to open his forum to advertising at all. But once he does, he must open it in an even-handed manner—absent some compelling showing of detriment or disruption to his normal programming services. No such evidence on this issue has been supplied to us.

I believe this Commission (perhaps for a two-year trial period) should require broadcasters to accept, up to recognized limits on numbers of commercials, *all* advertisements, whether commercial or political, from *any* person, for broadcast at rates determined by the licensee, on a first-come, first-served basis. If ghetto residents of our major cities wish to purchase announcements decrying the rat-infested, disease-ridden slums in which they are forced to live, they must be given their say. If the Daughters of the American Revolution wish to announce their support for the Vietnam War, they must be given their say. In short, I would open the broadcast spectrum to short announcements from all comers on a first-come, first-served basis. There will be time later to assess and evaluate—to consider, for example, whether the views of the rich predominate—at least, to a greater extent than they now predominate in mass media advertising. I would not expect any fairness doctrine problems. Few licensees would argue that they were unwilling to accept an advertisement because it might force them to present all views on an issue of controversy and public importance. This obligation is already incumbent upon them. And should the fairness doctrine prove unworkable in this field, it could be suspended for this type of programming.

III

The Commission also denies the DNC the right to purchase, at the going rates, half-hour or full-hour programming to discuss issues of national concern. I disagree. If broadcasters are to permit a General Motors or a Ford Motor Company, in effect, to purchase a full hour of "I Love Lucy" as a vehicle upon which to display their commercials, then I do not see how, consistent with the principles enunciated in

Wirta and other cases, the broadcasters can refuse to permit the leading representatives of our legislative branch of government to purchase the equivalent hour to display their ideologies and concerns. I would require licensees to accept programming of a political nature, if offered, in an amount up to 5% of their prime time evening schedule on a first-come, first-served basis. Assuming four hours of prime time every evening (from 7:00 p.m. to 11:00 p.m.), and calculating 30 days per month, that would release six hours per month to "pure access" by politicians and citizens groups alike. The individual licensee would, of course, still retain the right to reject programming for inadequate technical and production quality, or violation of federal law (lotteries, obscenity, etc.). But I would assume that programming purchased by the national political parties would, almost per se, meet any pre-established quality standards. Licensee profits would remain at their present high level. And there will be time later to assess this scheme and determine the extent to which fairness doctrine obligations apply. The fairness doctrine could be suspended in this limited area, on the assumption that persons wishing to respond could purchase the necessary reply time. Obviously this 5% figure is only an initial, approximate determination, and obviously any other reasonable percentage determined by the licensee would also be approximate. But the point is that licensees could not reject *all* programming.

The majority essentially raises several objections to such a procedure. First, they argue that this would permit those with "strong financial resources" to preempt time and distort the presentation of issues. And they maintain that the views of the wealthy would dictate the agenda of national debate. I disagree. The short answer is that the wealthy already set the agenda

for national debate, and a partial "access-for-purchase" procedure would only open a closed system to partial dissent. A longer answer, however, is simply that I have more faith in the theoretical "marketplace of ideas" than does the majority. I am not aware that opening the pages of newspapers or magazines, or the wall space of buses, train stations or subway platforms, have resulted in a preponderance of "wealthy" views. And I do know that the "Political advertising" that appears in daily newspapers—urging, for example, citizens to write the President in support or opposition of the Vietnam war—is more stimulating and thought-provoking than those of department stores and food chains. All in all, I do not see any imbalance in that system of "print" access. Why should we expect it in radio and television?

But more importantly the dissemination even of "false" or one-sided political ideas often serves a socially useful purpose. False commercial ideas (such as the notion that modern cars are "safe," or do not pollute the air) are unlikely to generate opposing claims; at best, they merely goad competing manufacturers into more and more extravagant claims. On the other hand, expressions of political opinion in this country usually lead to argument and debate, not silent acquiescence; to vigorous opposition, not passive acceptance. And debate and dissent is always healthy. John Stuart Mill saw this over 100 years ago, and I do not believe the passing century has proven him wrong:

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose

> what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. S. Mill, *On Liberty,* quoted in *Buckley* v. *Meng,* 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962). Given a system in which the small citizen and the man of moderate means are totally cut out from a system of communication, therefore, I believe a partial access system might move a small way toward righting the present imbalance.

The majority's second justification for its position is that we have a limited number of frequencies, and that some "trustee" must necessarily exercise control over broadcasting time. Any other system would result in chaos. Again, this begs the question. Merely because a "trustee" or "gatekeeper" must control some of the time, I see no compelling reason why he must control *all* of it. Broadcasters have essentially abdicated this "trustee" authority to commercial advertisers, gobbling up sponsors as rapidly as they approach, and limiting themselves only by the commercial maximums suggested for radio and television. They have also, on occasion, sold entire hours to sponsors such as Xerox or National Geographic to present their own programming. The question before us, therefore, is whether the present system of broadcasting could function with a *partial* system of access, leaving the vast bulk of programming still under the control of the networks and individual licensees. Nothing the majority has said convinces me that this is impossible.

The third reason given by the majority is that Section 3(h) of the 1934 Communications Act prevents licensees from being treated as a "common carrier." There are many defects in this position, some of which I have dealt with in my dissenting opinion in

Business Executives, FCC 70–860, Aug. 6, 1970. Some are as follows.

First, the legislative history of this provision suggests that the drafters of the 1934 Act were concerned only that Title II of the Act, "Common Carriers," and its rather complicated system of regulation, not be imposed on radio. No one would argue that a partial access system would have this result.

Second, Congress wrote into the 1934 Act the concept that broadcast licensees must serve the "public interest, convenience, and necessity." And it goes without saying that the basic principles of the First Amendment are also incorporated implicitly into the Act. We do not have to declare unconstitutional Section 3(h) of the Act to say that broadcasters must treat persons wishing to do business with it equally. We have ruled in our *Letter to Nicholas Zapple,* FCC 70–598 (1970), for example, that even apart from Section 315(a) considerations, there may be only one appropriate person or spokesman that can satisfy the fairness doctrine obligation imposed upon broadcasters in certain situations. Does this violate Section 3(h) of the Act, by taking from the license choice over the person that uses his facilities? Of course not. A limited system of access for purchase is perfectly consistent with Section 3(h) of the Act, the "public interest," and the First Amendment. Indeed, the First Amendment may require such a system or some reasonable facsimile.

Third, a reasonable system of access does not make broadcasters into common carriers. A doctrine preventing broadcasters from rejecting all persons wishing to submit political advertising or other programming does not force licensees to accept everyone. Obviously broadcasters can establish reasonable limitations on the amount of time he will offer other per-

sons. See *United Broadcasting Co.* (WHKC), 10 F.C.C. 515 (1945). The First Amendment does not establish any particular proportion on percentage figure; it does require, however, that broadcasters devote *some* "reasonable" portion of their time to "access" programming.

IV

The matters before us go far beyond freedom of speech. For in the last analysis, we are confronted with one of the most serious challenges to the system of "checks and balances," the separation of the legislative and executive powers of government, that our country has ever faced. If, for example, through some bizarre turn of events the President, but not the Congress, was granted access to the computer, the telephone, the telegraph, the typewriter, the printing press, and the Xerox machine, we would also see a constitutional quandary of the proportions that face us now. The President has immediate, direct and vivid access to all the minds of the prime-time television viewers in America. Can our tri-partite scheme of government survive if the Congress receives substantially less?

Unlike the fairness doctrine, which often imposes a burden on broadcasters due to the importance of the *issue* to the public, principles of pure "access" pay their own way. The broadcasting industry is out-of-pocket nothing. The great mass of news, documentary and entertainment programming will be unaffected. And the forums of the air will be opened to the breeze of dissent, controversy, and thought.

Unlike the fairness doctrine, an "access" system is self-enforcing. No governmental agency is called upon to decide which issues are controversial and of public importance. Issues reach the public immediately,

without the years of delay required to push a fairness doctrine controversy through the Commission and the courts.

And, unlike the present system, the views that reach the people will not be dominated by the consensus committees of the corporate television establishment. There are some who fear that the agenda of debate will be set by the rich. But who, after all, sets that agenda now? The great mass of television programming consists of format entertainment series, carefully designed as supportive and palatable packaging for the commercial content supplied by the merchandisers of our land. To the extent a network seeks to provide programming which is "offensive" to some corporate interest, then pressures for censorship are brought to bear—as Coca Cola is alleged to have pressured NBC over its recent documentary on migrant workers. All we can hope for is a system of access in which at least a small percentage of the time and views will originate directly from the people—of all views, persuasions, and walks of life. That even that modest participation is anathema to the broadcasters is testimony to their dangerous arrogance and unrestrained power. Accordingly, I dissent to today's Commission action.

APPENDIX C

[Federal Communications Commission Reports]

F.C.C. 70-860

Before the Federal Communications Commission,
Washington, D.C. 20554

IN RE COMPLAINT BY BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE

Concerning Fairness Doctrine Re Station WTOP, Washington, D.C.

AUGUST 5, 1970.

BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE,
% Asher & Schneiderman,
1320 19th Street NW.,
Washington, D.C.

GENTLEMEN: This is with reference to your complaint dated January 22, 1970, against the licensee of Standard Broadcast Station WTOP, Washington, D.C., and to statements subsequently submitted by you and the licensee.[1]

From information before us it appears that the complainant, Business Executives Move For Vietnam Peace Organization (hereinafter called BEM), a national organization of more than 2700 business owners

[1] Pleadings before the Commission include: Complaint filed by BEM on January 22, 1970; letter of response filed by Post-Newsweek Stations (WTOP) on February 5, 1970; letter of reply filed by BEM on February 16, 1970; letter requesting Commission action filed by BEM on February 24, 1970; letter filed by WTOP on February 24, 1970; letter filed by BEM on February 26, 1970, and response of WTOP filed February 27, 1970; letter filed by WTOP on February 27, 1970; letter filed by BEM on March 10, 1970; letter filed by WTOP on April 3, 1970; and letter filed by BEM on April 15, 1970.

452-787—71——8

and executives sought, in June 1969, to purchase time on WTOP for the purpose of broadcasting one-minute announcements urging immediate withdrawal of American forces from Vietnam and from other overseas military installations. While there is some indication that the complainant was informally given a favorable response, WTOP declined to sell time. BEM renewed its request in July, 1969 and again in January, 1970 with the same negative result. The licensee cited its long established policy of refusing to sell spot announcement time to individuals or groups to set forth views on controversial issues and stated that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30 or 60 second announcement.

Complainant's initial request to the station made no reference to the fairness doctrine and after being turned down in its attempts to purchase time, complainant made no further demands upon the licensee in terms of fairness doctrine, i.e. that the station in its coverage of the Vietnam issue present views similar to those expressed in BEM's statements. Complainant now alleges, however, that in refusing to sell or to provide free time for the announcements, the licensee has violated the fairness doctrine, infringed on the public's right to hear contrasting views such as those contained in BEM's announcements, and violated the First Amendment to the Constitution by suppressing free speech. Therefore, complainant contends, the Commission should order the licensee to present its announcements, either free of charge, or, in the alternative, at commercial rates. In response, the licensee denies complainant's charges and asserts that it has complied fully with all relevant statutes and Commission rules and policies. We shall deal first with the fairness aspect of the complaint. Normally, fairness

complaints arise as a result of unsuccessful negotiations between the complainant and the station licensee. The Commission has developed procedures for the filing of a complaint under the fairness doctrine in the following manner:

> * * * The Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoint.[5] [2]

In short, by the time a complaint under the fairness doctrine reaches the Commission, the parties (both the complainant and the station) will have had an opportunity to fully crystallize their positions and delineate their areas of agreement and disagreement.

In the case before us, BEM initially made a request to purchase air time for the presentation of a number of spot announcements dealing with United States presence in Vietnam. The same request was made on at least three occasions with the variation that if WTOP would not sell time for this purpose, that it should provide it free of charge. The pleadings before us do not indicate that at any time BEM sought station coverage of views similar to those urged in its spot announcements by WTOP in its program coverage of the Vietnam War.

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[5] The complainant can usually obtain this information by communicating with the station.

[2] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29, Fed. Reg. 10415, 10416.

Consequently, while we will consider the complaint of BEM in its entirety, we believe the issue would have been immeasurably sharpened if the procedures set forth above had been observed.

BEM states that the Vietnamese war is unquestionably a controversial issue of public importance; that although WTOP has regularly presented the views of government officials and others supporting the Administration's position, it has not devoted a significant amount of time to contrasting views; that the war has provoked a wide diversity of responsible views, rather than merely views on "two sides;" that BEM advocates views in contrast to those already broadcast;[3] and that only by permitting BEM to air its views can WTOP comply with the legislative policy that it "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[4]

In response, the licensee states that it has tried to provide balanced coverage of the Vietnam war issue in news reports, news interviews, commentary and state-

[3] A review of BEM's announcements reveals that the following views are expressed: (1) that the bloodshed which may result from United States withdrawal from Vietnam does not compare with the bloodshed presently going on in Vietnam; (2) that the United States should not remain in Vietnam, because the war is morally corrupt, politically inept, and militarily stupid; (3) that the war is destroying the United States internally; (4) that the South Vietnamese government does not represent the people; (5) that "Vietnamization" of the war will prolong the war; (6) that the United States should try to save lives by withdrawing and not try to "save face;" (7) that the war is a "national disgrace;" (8) that our withdrawal must be total; (9) that remaining in Vietnam is based on a pseudo-patriotic principle; and (10) that the United States needs to overhaul its entire foreign policy.

[4] 47. U.S.C. § 315.

ments by both supporters and opponents of the Administration policy. It cites extensive coverage of Moratorium activities last fall, including press conferences, meetings and rallies of numerous anti-war groups, and its handling of the President's speech of November 3, 1969, following which it presented five leaders generally supporting the President's position and six leading critics of his policy. It states that it has broadcast the diverse views of its own commentators (Carl Rowan, Drew Pearson, Rod MacLeish and James J. Kilpatrick) and also carries the CBS programs, "Face the Nation" and "Capitol Cloakroom," which it states have provided opportunity for national leaders to present views both for and against the President's policy. WTOP alleges that BEM's complaint lacks the specificity which the Commission requires to establish unfairness, and states that "A complete quantitative evaluation of the coverage of any station, let alone an all-news and information station [WTOP], of as long-continuing an issue as the Vietnam War and President Nixon's policy with respect to that war would be virtually impossible as a practical matter." However, it states that a spot check of the three-month period, April–June 1969, reveals that its news reports and other programs included the views of a variety of Administration critics on the war on numerous occasions. The licensee has submitted an affidavit by the Executive Editor of WTOP Radio, stating that "of my own knowledge . . . each of the viewpoints embodied in the BEM announcements has been expressed on a number of occasions in various types of broadcast over WTOP . . . ."

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of significant contrasting viewpoints on the issue

in its overall programming, which may include news programs, interviews, discussion, debates, speeches and the like. No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views. As we stated in our *Report In the Matter of Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949):

> In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person (or group) making the request.

In the present case, because of the multiplicity of spokesmen available to express views on the Vietnam war, it is obvious that a licensee must exercise its judgment in choosing appropriate spokesmen to insure an orderly and effective presentation of the many conflicting views. The question, then, is whether a licensee has exercised reasonable, good faith judgment in applying the fairness doctrine to a particular issue or issues.

In the letter to *Mrs. Madalyn Murray,* 40 FCC, 647, 5 RR 2d 268 (1965), we stated:

> A licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation . . . as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming. In passing on any complaint in

> this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

On the basis of BEM's complaint and the licensee's response, we are unable to find that the licensee acted other than reasonably and in good faith in refusing to make time available for the broadcast of BEM's announcements. On the one hand, we have the licensee's assertion that it has presented a wide variety of views on the Vietnamese war, including those embodied in the proposed announcements. The licensee has cited a number of specific instances in which it has presented views opposed to further American participation in the conflict. On the other hand, we have no more than a general allegation that WTOP has failed to present significant contrasting views on the subjects covered in the announcements. As we stated with regard to similar vague allegations in our letter of November 25, 1969, to *Allen C. Phelps and the Federation of Citizens Associations of the District of Columbia,* 21 FCC 2d 12, where it was charged that this same licensee had presented only the "liberal" viewpoint on a number of issues such as racial discrimination:[5]

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove alle-

[5] The *Phelps* complaint charged that WTOP's violation of the fairness doctrine was manifest by one-sided coverage of issues such as "liberal v. conservative" political philosophy, coverage of the Nixon administration, hostility toward the South, problems of the District of Columbia including crime, race relations, law and order and the station's attitude toward mass demonstrations.

gations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time. Accordingly, although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (e.g., in-depth spot checks at renewal time), it has long been our policy normally to require that fairness doctrine complaints (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue. See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964).

In short, where, as here, the complainant has made only a general allegation and the licensee has answered by affidavit that it has presented such viewpoints on numerous occasions, pointing also to example coverage of the Vietnam war, it is not unreasonable that the burden be placed on the complainant to come forward with some indication why a more detailed showing should be required—why it is he believes that the licensee has been unfair. Here the complainant has wholly failed to do so. We stress that we are not requiring complainants in this area to prove their case ahead of time. To place any undue burdens on such complainants would be inconsistent with the public interest since the Commission does depend for pur-

poses of enforcement to a large extent on complaints in this area. However, the complainant must have some basis for his complaint that a licensee has been unfair and that basis can and should be set forth (e.g., several days monitoring of news or public affairs programming, with the assertion that only one viewpoint is presented). For, just as an undue burden should not be placed upon complainants, so also it is inappropriate to place such a burden on the licensee. A complainant cannot simply say the word, "Vietnam", "racial discrimination", "pollution", and require a licensee to devote extensive man-hours to cull over his past programming to show fairness on general issues of this nature. This would be particularly burdensome to smaller stations, and would not be a policy promoting "robust, wide-open debate". Cf. *The New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). In sum, as a public trustee, the licensee must shoulder certain burdens, including upon an appropriate complaint the burden of showing that he has complied with the fairness doctrine, but based on our experience we find that the public interest also requires some reasonable specificity in a complaint to trigger this detailed showing by the licensee. There is no such specificity in this case, just as there was none in the *Phelps* case.

Before passing to the next particular of the complaint, we take cognizance of BEM's contention that licensee's policy of refusal to sell time for the broadcast of spot announcements dealing with controversial issues violates the fairness doctrine and amounts to "picking and choosing among topics so as to give exposure only to those which it prefers." It states that WTOP does broadcast announcements "on such controversial subjects of public importance as religion, the environment, the national economy, armed forces

recruiting and smoking," and that it presents brief editorials taking positions on controversial issues. WTOP replies that it does not believe that the public service announcements it carries involve controversial issues of public importance; that it does not broadcast cigarette advertising, and that it believes that the anti-smoking announcements which it carries are in the interest of public health and welfare, comparable to consumer reports "to help protect the public from fraudulent or deceptive business practices." It states that its editorials are two minutes in length and "provide enough time for development of position," whereas, it asserts, "The actual substantive portion of the BEM spots [ranges] from about 20 seconds to 35 seconds . . .".

We find no reason to reverse our prior ruling in *Women's Strike for Peace* that the WTOP policy in question does not *per se* violate the fairness doctrine or any other Commission policy.[6] Citing Section 3(h) of the Communications Act of 1934, as amended,[7] we pointed out in that ruling that a broadcasting station is not a common carrier under the Act and therefore is not required to open its doors to all persons seeking to use the station's facilities for whatever purpose. As we stated in our letter to *Mrs. Madalyn Murray, supra,* it is within the licensee's judgment to determine the format for presentation of controversial issues "and all other facets of such programming." The licensee here has asserted, without rebuttal other than the unsupported assertions of complainant, that it has presented contrasting views, including the viewpoints

[6] Letter to *Washington Women's Strike for Peace*, November 22, 1965.

[7] Section 3(h) of the Act provides, in pertinent part, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

embodied in complainant's announcements on the recited issues, and we find no reason to require that it present in addition the views of any particular group or in any particular format. We need not develop this point further, in view of the extensive treatment given the legal and policy consideration in the DNC ruling, 1 art I, issued this day, FCC 70– ——. We rely here on those considerations.

In the second part of its complaint, BEM asserts that WTOP has frustrated the public's right to hear the views of BEM and thus has denied "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."—citing *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U.S. 367, 390 (1969). However, as we noted above, the licensee has furnished or tendered evidence that it has provided suitable access to the public on the ideas which BEM wishes to express, and it is clear that in this passage the Supreme Court was stressing the essential nature of the fairness doctrine, rather than the right of a particular spokesman to obtain access to the air, except in cases of personal attack and editorials endorsing or opposing political candidates. The Court stated:

> To condition the granting or renewal of licenses on a willingness to present *representative* community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgement of freedom of speech and freedom of press. *Id.* at 394 (emphasis added).

And in distinguishing between the general fairness obligation and the special obligations imposed in the case of a personal attack or a candidate endorsement, the Court noted that,

> These obligations differ from the general fairness requirement that issues be presented and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to present that side. *Id.* at 378.

Inasmuch as WTOP appears to have presented "representative community views" on the issues here in question, we find that it has not acted contrary to the principles laid down in *Red Lion*. See discussion in *DNC* ruling, *supra*.

Finally, BEM argues that the Commission would be violating the First Amendment rights of BEM's spokesmen by sanctioning the licensee's policy of refusing to sell BEM time. Complainant relies principally upon the *Red Lion* decision. We do not believe that the Court's decision supports complainant's conclusion. As noted above, the Communications Act specifically provides that a broadcaster shall not be deemed a common carrier, and thus he may exercise his judgment as to the particular program matter he will present. The licensee is thus constantly called upon to make choices between types and formats of programming and the persons to participate therein. If the licensee were required to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt. *DNC* ruling, *supra*.

Based on the foregoing, we cannot find that the licensee of WTOP acted unreasonably or in bad faith with respect to the fairness doctrine, nor do we believe that its conduct was inconsistent with the principles laid down by the Supreme Court in *Red Lion* or infringed the First Amendment rights of BEM's

spokesmen. Accordingly, the complainant's request for relief is denied.

Commissioner Bartley concurring in the result; Commissioner Cox concurring and issuing a statement; Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Concurring Statement of Commissioner Kenneth A. Cox

I concur in this action because BEM has not made an adequate showing that its members' views have not been reasonably reflected in matter broadcast by WTOP. It is implicit in this ruling, of course, that if the station had not devoted reasonable time to the issues involved in the Vietnam War—including the positions espoused by BEM—it could have been required to do so. But that marks the extent of its obligation to the public in this regard. To require more would pose serious problems for the continued health of our broadcast system and would clearly discourage the full and effective practice of broadcast journalism. The fact that BEM is willing, if need be, to pay for time to broadcast its views does not alter this. In the first place, if stations were required to carry all spots dealing with controversial issues for which time was ordered, this might occupy much of the time which can be devoted to nonprogram matter and could, in time, impair the effectiveness of the broadcast media for advertising purposes. Furthermore, although BEM is willing to pay, our ruling in *Letter to Cullman Broadcasting Co., Inc.,* FCC 63–849, would subject any station carrying its messages to the risk that those holding contrary views might

claim free time for reply. I fully support the *Cullman* doctrine in those cases where broadcasters elect to accept sponsored controversial issue programming or paid spots, but think that to *require* them to accept such matter would unreasonably expose them to erosion of their advertising revenues. I have made it clear that I do not think broadcasters should escalate commercial time or seek to maximize their profits, but our system depends upon profitable commercial operation and I am not prepared to try to change that fundamental fact.

I do not think our ruling should be understood as holding that it would have been contrary to the public interest for WTOP to carry BEM's announcements, as other stations apparently did. While the brevity of the messages makes it impossible for them to develop ideas to any significant degree, I do not think we are in a position to rule that those who oppose the war in Vietnam should be completely barred from using this technique for getting their viewpoints across to the public. But I think their right of access to time on a station which has already adequately treated the war issues and has already reflected a particular claimant's position must depend on that station's willingness to accept such spots, with full understanding of its resulting obligations under the Fairness Doctrine, including the *Cullman* ruling.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

> The peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; [and] those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of

> exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error * * *
>
> —J. S. Mill, *On Liberty,* quoted in *Buckley v. Meng,* 230 N.Y.S. 2d 924, 932 (Sup. Ct. 1962).

History will record, I believe, the fundamental misstep taken today by the Commission in its slow progress toward securing truly free speech for all citizens over the broadcast media. Almost two hundred years ago, the architects of our country drafted a constitutional scheme of government based on the bedrock of one paramount principle: that a free society would endure only so long as its citizens had the freedom to think, to speak openly, and to criticize their government. This First Amendment freedom of speech and press was "preferred" above all others, see *Marsh* v. *Alabama,* 326 U.S. 501, 506 (1946), *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945), for all other liberties could be defended only so long as speech remained free. But should free speech vanish, then the informed electorate necessary to preserve other freedoms would cease to exist.

Yet freedom of speech does not exist as an abstraction. The First Amendment protects not just the right to speak, but the right to reach an audience—the right to *communicate.* Protection of the means used to disseminate ideas, therefore, as well as the availability of forums used for discussion and debate, must receive as much attention as the more abstract right to speech itself:

> The right of free speech necessarily embodies the *means* used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists

> merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely. The right to speak freely must encompass inherently the right to communicate. The right to speak one's views aloud, restricted by the ban that prevented anyone from listening, would frame a hollow right. Rather, *freedom of speech entails communication; it contemplates effective communication.*

Wollam v. City of Palm Springs, 379 P. 2d 481, 486 (Cal. 1963) (emphasis supplied).

The Supreme Court has often recognized this principle, holding that forums for the expression of views must remain free and open, and that the preservation of these forums for the communication of views between citizens is one of our most important goals. In *Hague* v. *CIO,* 307 U.S. 496 (1939), Mr. Justice Roberts made the statement that *Kunz* v. *New York,* 340 U.S. 290, 293 (1951), later elevated to precedent:

> Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. *CIO, supra* at 515. The Supreme Court has recognized this right of access to a "public forum" of communication in numerous other areas, including privately owned sidewalks, *Marsh* v. *Alabama,* 326 U.S. 501 (1946), modern shopping centers, *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), and public

schools, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). And the Court has also acknowledged the importance of the press, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), and the electronic media, see *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969), as forums or *means* for the communication of thought.

The question before this Commission, therefore, is the extent to which the First Amendment *requires* that the public forums of broadcasting be equated with the "streets and parks" of *Hague* v. *CIO*, and that the rights of citizens' access to those forums be included among the basic "privileges, immunities, rights and liberties of citizens." We must determine whether private corporate licensees of the FCC have any more right to exclude citizens from the use of their facilities, than a privately owned "company town," see *Marsh* v. *Alabama*, 326 U.S. 501 (1946), has a right to exclude citizens from its streets. The broadcast spectrum is public property belonging to the citizens of this country. It is entrusted for limited periods of time to the trusteeship of private entities, corporate broadcast licensees. I believe these corporate licensees must be treated, for purposes of speech freedoms, as privately owned "company towns."

The issue, therefore, is not what policy the Commission might wish to adopt concerning the "advertisements" before us, but what the Constitution *requires* the Commission to adopt. "In seeking to provide the broadcasting media with the diversity *demanded* by the first amendment, . . . the Commission must avoid the perils of . . . abdication which would allow those possessing the most economic power to dictate what may be heard. . . ." *National Ass'n of Theatre Owners* v. *FCC*, 420 F. 2d 194, 207 (D.C. Cir. 1969)

(emphasis supplied). I believe the Commission has failed in this task.

The facts here are simply stated. Complainant, Business Executives Move for Vietnam Peace (BEM) is a well-established national organization with more than 2,700 members from business communities across the country. BEM has sought, unsuccessfully, for over a year, to purchase airtime on WTOP–AM in Washington, D.C., at its standard commercial rates, to present to residents of the nation's capital (including nationally elected members of the government) one-minute "spot announcements" urging immediate withdrawal of American troops from Vietnam and otherwise opposing the current Administration's war policy. WTOP–AM has denied BEM access to its broadcast facilities—which it freely offers to purveyors of mouthwash, underarm deodorant, and hand soap—on the ground that the station has a long-established policy of refusing to sell spot announcement time to individuals or groups with "controversial" views. WTOP–AM's principal justification for this policy is the belief—apparently not shared by BEM—that "subjects of this type require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." The Commission has thrown the weight of its precedents and support behind WTOP–AM's decision to bar the views proffered by BEM. Citing Section 3(h) of the 1934 Communications Act, the Commission argues that licensees are not "common carriers" and therefore WTOP–AM is "not required to open its doors to all persons seeking to use the station's facilities for whatever purposes." The majority thus delegates to "the licensee's judgment" the power to determine "the format for presentation of controversial issues 'and all other facets of such programming.'" Any other result, the Com-

mission contends, "would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt."

The Commission's decision, I believe, ignores a long line of judicial precedent which guarantees to individuals a *right of access* to forums generally open to the public for expression of views. These cases, which I will discuss in detail below, establish the proposition that a private or public corporation, which exercises possession of, or control over, property which is open to the general public or to the communication of particular views, cannot discriminate between the persons or views that seek access to its facility, barring some and admitting others. BEM's request, therefore, places the following four issues before the Commission: *first,* are BEM's anti-war spot advertisements constitutionally protected "speech" under the First Amendment; *second,* is the action of WTOP–AM, a private corporation licensed and supervised by a public agency in a fiduciary or trustee capacity for public property, sufficient "state action" to bring the First Amendment's protections into operation; *third,* are BEM's proposed spot announcements an "appropriate" exercise of speech activities in the public forum of WTOP–AM's frequency, given the character, usual activity and purpose of the forum and the nature of competing uses; and *fourth,* is a limited right of "non-commercial paid access" to WTOP–AM's frequency consistent with Section 3(h) of the Communications Act of 1934, which declares that broadcast licensees shall not be deemed "common carries." I believe the Constitution compels an affirmative answer to all four questions. For the reasons stated below and in my dissenting opinion in Democratic National Committee, FCC 70–861, Aug. 5, 1970, I dissent to the majority's treatment of these issues.

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I. ADVERTISEMENTS AS PROTECTED "SPEECH"

The Supreme Court has drawn a distinction between two types of speech: the first, political or social speech, is entitled to the fullest constitutional protection. Indeed, Professor Harry Kalven believes the "central meaning of the first amendment" is to preserve the citizen's right to criticize those who govern for him. Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 Sup. Ct. Rev. 191, 208–09; see Meiklejohn, *The First Amendment Is An Absolute,* 1961 Sup. Ct. Rev. 245, 256.

The second type of speech, "commercial" speech, however, has not been given much deference. "In the quarter century since *Valentine* v. *Chrestensen* [316 U.S. 52 (1942)], the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." Note, *Developments in the Law: Deceptive Advertising,* 80 Harv. L. Rev. 1005, 1027 (1967); see, *e.g., Ginzberg* v. *United States,* 383 U.S. 463, 474 n. 17 (1966); *Polak* v. *Public Util. Comm'n.,* 191 F. 2d 450, 456–57 (D.C. Cir. 1951) (dictum), *reversed on other grounds,* 343 U.S. 451 (1952); see also, Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191 (1965). In *Valentine* v. *Chrestensen, supra,* the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court simply observed that "the Constitution imposes no * * * restraint on government as respects purely commercial advertising." *Valentine* v. *Chrestensen,* 316 U.S. at 54.

Although the distinction drawn is an elusive one, it divides, perhaps, speech which seeks to influence political and social decisions in the marketplace of ideas

from speech which seeks to influence private economic decisions in the marketplace of goods and services. Compare *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943) (conviction for door-to-door solicitation of contributions for religious literature reversed), and *Jamison* v. *Texas,* 318 U.S. 413 (1943) (advertisement on back of religious handbill protected), with *Breard* v. *Alexandria,* 341 U.S. 622 (1951) (conviction for door-to-door solicitation of magazine subscriptions upheld). And while this distinction has been severely criticized, see *Cammarano* v. *United States,* 358 U.S. 498, 513–15 (1959) (dictum) (Douglas, J., concurring), and I think with reason, it may indicate that the dissemination of "false" political ideas can evoke discussion or controversy which may refute or highlight the falsity of the original statement. "False" commercial assertions, by contrast, may only breed additional false claims from competitors with no corresponding improvements in the products sold. Note, 80 Harv. L. Rev. 1005, 1030 (1967). Viewed in this light, WTOP–AM and the Commission have relegated political and social speech to a peculiarly inferior role. By permitting broadcasters categorically to exclude political advertisements and accept only commercial announcements, the Commission has encouraged exclusion of highly valued political speech to the benefit of paid commercial speech.

With this in mind, it is clear that the paid anti-war advertisements proffered by BEM fall within the category of protected—indeed highly valued—political speech. The fact that BEM is willing to pay the "admission price" for access to WTOP–AM's facilities does not detract from the purpose of its message to encourage political decisions in the marketplace of ideas. The Supreme Court in *New York Times Co.*

v. *Sullivan*, 376 U.S. 254 (1964), conclusively laid all doubts to rest on this point:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. * * * That * * * the advertisement [was paid for] is as immaterial * * * as is the fact that newspapers and books are sold. [citations] * * * *Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.* [citation] * * * The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." [citation] * * *
>
> * * * The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.

New York Times Co. v. *Sullivan, supra* at 266, 271 (emphasis supplied). "[W]hen an advertisement is the medium for noncommercial expression, constitutional freedoms apply in spite of its commercial nature." Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 309 (1969) (citing further authority at n. 131). *Accord, Banzhaf* v. *FCC*, 405

F. 2d 1082, 1101–02 (D.C. Cir. 1968); *Zucker* v. *Panitz*, 299 F. Supp. 102, 104 (S.D.N.Y. 1969); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982, 984–85 (Cal. 1967).

I conclude, therefore, that BEM's anti-war advertisements are "speech" deserving of First Amendment protection.

II. "STATE ACTION"

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech. * * *" Although the language of this amendment binds only the national government, the Supreme Court has extended its protection to actions by the states as well. *Fiske* v. *Kansas*, 274 U.S. 380, 387 (1927); *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). "Yet, while the Fourteenth Amendment affords protection from state action as well as that from the national government, it does not protect against wrongs done by private persons." *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 307 F. Supp. 422, 425 (N.D. Ill. 1969). In order, therefore, to establish a violation of the First Amendment, there must be "state action"—here by the federal government—which deprives a group or individual of the speech freedoms guaranteed by the First Amendment.

On its face, the refusal by WTOP–AM to accept BEM's advertisements is "private action" by a private corporate licensee, and therefore not restrained by the Constitution. Yet the "state action" requirement has been found in the actions of many non-governmental persons or corporations. In each case, the private action has been sufficiently "involved" with the state that the restraints of the Constitution have

been found to apply. The question before us, therefore, is whether WTOP–AM's actions are involved with the the federal government to such an extent that the Constitution sets limits to its action. To paraphrase *Farmer* v. *Moses,* 232 F. Supp. 154, 158 (S.D.N.Y. 1964) (grounds of World's Fair equivalent in status to public property), the question is whether WTOP–AM's actions "are so impregnated with and supported by state * * * action as to place them within the ambit of the [First] Amendment * * * even though [WTOP–AM] * * * possesses certain indicia and aspects of 'private' ownership and dominion."

I believe that WTOP–AM's rejection of BEM's advertisements clearly constitute "state action" under a number of state action theories.

A. Public Property

The broadcast frequencies are a valuable and scarce resource belonging to the public. Although broadcast licensees are given the temporary use of this public property for terminable three-year periods, ownership and ultimate control remain vested in the people of the United States. In Section 301 of the 1934 Communications Act, Congress evidenced its clear intention that the broadcast spectrum should remain "public property":

> It is the purpose of this Act * * * to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels *but not the ownership thereof,* by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. [Emphasis supplied.]

The mere fact that the licensee's actions are taken with respect to public property should suffice to meet the test of required "state action." See Tucker v. *Texas,* 326 U.S. 501 (1946) (actions by municipal officials over property of government-owned town comprised "state action").

B. Private Lessee of Public Property

It is equally clear that the requirement of "state action" cannot be evaded by the *lease* of public property, by a public entity, to a private individual. Discrimination by private lessees with respect to public property, for purposes of the First Amendment, has unequivocally been deemed state action by the courts. *E.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (state leased space in public building to privately owned restaurant); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); *Farmer* v. *Moses,* 232 F. Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] * * * services * * * are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); *Anderson* v. *Moses,* 185 F. Supp. 727, 733 (S.D.N.Y. 1960) ("private * * * concessionaire [operated] on public * * * property for the convenience and comfort of the public"); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969) (action by private advertising agency, pursuant to "contract" with city, in removing advertisements from municipal buses comprised state action); *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P. 2d 982 (Cal. 1967) (publicly owned advertising space on municipal buses "leased" to private advertising company). In *Marsh* v. *Alabama,* 326 U.S. 501

(1946), a privately-owned "company town" was found to serve a "public function," and that its exclusion of a person seeking to distribute religious literature comprised "action" sufficient to bind it by the requirements of the First Amendment. If under certain circumstances the private owner of private property is bound by state action, then surely the private *user* of *public* property is no less bound. See, *e.g., Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970) (privately owned shopping center); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964) (same).

In sum, therefore, "a broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. * * *" *Office of Communication of United Church of Christ* v. *FCC,* 359 F. 2d 994, 1003 (D.C. Cir. 1966). Surely we could not assume that the federal government has leased public property to private individuals, yet attempted to free them from the obligations of the Constitution. First Amendment obligations are certainly among those imposed upon all broadcast licensees.

C. "Delegation" of State Power

When the state "delegates" its authority over public property to the use and control of a private entity, then the exercise of that use is state action for purposes of the Constitution.

> [W]here a state delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. [Citation.] * * * That is to say, when private individuals or groups are endowed by the State with powers of functions governmental in na-

> ture, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

Evans v. *Newton,* 382 U.S. 296, 299 (1966) (although a state "delegated" its authority over public park to to private trustees, discriminatory conduct of trustees comprised state action). WTOP-AM has exercised powers of control over its broadcast frequency which are governmental in nature—that is, the exclusion of persons wishing to express their views through a public facility of communication. See, *e.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961) (discrimination by private restaurant lessee using and occupying publicly owned land and building "dedicated to 'public uses'" was state action); *Smith* v. *Allwright,* 321 U.S. 649 (1944) ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state"). Because, like any lessee, a broadcaster derives all his power through delegation from the federal government, private actions taken by the broadcaster-licensee-trustee with respect to his trust "res" are imbued with the attributes of state action. A licensee can only exercise the power he has, and the power he has flows from the government.

D. Involvement of Regulatory Agency

In *Public Utilities Comm'n.* v. *Pollak,* 343 U.S. 451 (1952), the Court addressed the question whether action by a privately owned public bus company, regulated by the Public Utilities Commission, was to be treated for purposes of the Constitution as action by a governmental entity. In finding sufficient state action, the Court specifically relied upon the fact that the bus company "operate[d] its service under the

regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." *Id.* at 462. The Court cited as authority the following proposition from *American Communications Assn.* v. *Douds*, 339 U.S. 382, 401 (1950): "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." There is little doubt that both the Congress and this Commission are substantially involved in the operations of broadcast licensees. Again this involvement should provide the requisite state action. Indeed, *the Commission itself* has expressly acknowledged that discrimination by licensees may constitute improper state action:

> [A] substantial case has been made that because of the relationship of the government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity. * * * The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C. 2d 240, 241 & n. 2 (1969).

E. State Encouragement or Lack of Neutrality

In *Evans* v. *Newton*, 382 U.S. 296 (1966), a state court permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The Supreme Court barred the discrimination. In a concurring opinion, Justice White pointed out that a provision of state law permitted private trust settlors to dedicate their property to the public for use as a park and limit the

use of that park "to the white race only." Although this statute did not *compel* a settlor to discriminate, it certainly indicated that such an action would be *valid*. According to Justice White, this statute "depart[ed] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and * * * involve[d] the State in the private choice. * * *" *Id.* at 306. By encouraging discrimination, although not requiring it, the state sufficiently intertwined itself with private discriminations to constitute state action. See also *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

There are close parallels with WTOP–AM's censorship of BEM. Section 3(h) of the Communications Act provides that licensees shall not be deemed a "common carrier," and the Commission, reversing prior precedent, see *e.g.*, *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515 (1945), has interpreted this to give licensees the discretion to close their doors to persons seeking to use the station's facilities. See *Letter to Washington Women's Strike for Peace*, Nov. 22, 1965 (cited by the majority in the instant case). I believe that the Commission's interpretations and enforcement of the Communications Act, together with its improperly intentioned reversal of prior Commission doctrine, see *Reitman* v. *Mulkey*, *supra*, provides similar "encouragement" for discrimination by private licensees of the sort involved here. *Cf. Adickes* v. *S. H. Kress & Co.*, 38 U.S.L.W. 4434, 4444 (Sup. Ct., June 2, 1970) (Brennan, J., concurring in part); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963) (statements by Mayor and Superintendent of Police encouraging private discrimination found to be state action). This encouragement should suffice for state action. We need not address the question whether

Section 3(h) of the Act itself "encourages" licensee discrimination sufficient for state action.

F. State Action Through Quasi-Judicial FCC Action

In *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), the Court announced that "action of state courts and judicial officers in their official capacities is to be regarded as action of the State. * * *" *Id.* at 14. Although the Court also suggested that state action might not be found where a State through its court merely "abstained from action, leaving private individuals free to impose such discrimination as they see fit." *Shelley* v. *Kraemer,* 334 U.S. at 19, this distinction beween court "action" and "inaction" has apparently been weakened by later rulings. Thus, in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court remarked, in finding the First Amendment to protect the New York Times against a civil suit by a *private* party, that "[i]t matters not that the law has been applied in a civil action and that it is common law only. * * * The test is not the form in which state power has been applied but, *whatever the form,* whether such power has in fact been exercised." *Id.* at 265 (emphasis supplied). For a discussion of the state action implications of *New York Times Co.* v. *Sullivan,* see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action,* 1965 Duke L. Rev. 219, 227–30.

In a recent opinion, *Edwards* v. *Habib,* 397 F. 2d 687 (1968), Judge Wright, speaking for the Court, discussed in detail current interpretations of *Shelley* v. *Kraemer.* After a review of the precedents and other prevailing views, he summarized them thus:

> It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when

> he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law. [Footnote omitted.] Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action." [Citing Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208, 209 (1957)].
>
> * * * On this theory, if it would be unreasonable to prefer [a particular private person's] * * * interests, it would also be unconstitutional.

Edwards v. *Habib, supra* at 695. For commentators discussing this view, see Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action, supra*, at 241–45; Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 Calif. L. Rev. 1 (1964); Williams, *The Twilight of State Action*, 41 Texas L. Rev. 347 (1963); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment, supra.*

Marsh v. *Alabama*, 326 U.S. 501, 509 (1946), apparently provides support for this view. There, the Court "balance[d] the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion" and stressed that the latter freedoms occupied "a preferred position." See also *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), and

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964), in which state courts were used merely as forums for the resolution of essentially private disputes. In all these cases speech freedoms were involved, and in each case the Court "balanced" the rights to speech under the First Amendment against the rights to the enjoyment of property under the Fifth Amendment.

Rather than forcibly entering the premises controlled by WTOP–AM to broadcast their message through attempted "self-help," BEM has come to this Commission to seek a legal adjudication of its rights. After an investigation of the factual allegations and due consideration of BEM's legal arguments, *cf. Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 462 (1952), the Commission has effectively "ejected" BEM from WTOP–AM's facilities. Compare *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (state trespass laws used to eject picketers from private property). By adjudicating the rights and liabilities of the parties to this matter, and therefore binding the parties to a certain course of action, this Commission has invoked the "full panoply of its power," *Shelley* v. *Kraemer*, 334 U.S. at 19, to banish BEM to silence. This, I believe, should provide sufficient state action to invoke the restraints of the Constitution. This is particularly so when the broadcast licensee is not a purely private entity at all, but is licensed by the federal government and performs a "public function" similar to that performed by the government toward public parks and streets. See *Marsh* v. *Alabama*, 326 U.S. 501, 507 (1946).

G. State "Acquiescence"

In all the cases discussed in the previous sections, the courts have sought to establish at least some

formal connection between private and public action. But in a number of important cases, the immediate "action" necessary to invoke the First Amendment was not direct, affirmative involvement by the government in private conduct, but state "acquiescence" in a certain type of private actions. In all these cases, however, the state had either relinquished its power to private entities (through assignments of control, or leases), or simply abdicated its power role (by failing to impose requirements, for example, on corporate entities under its licensing control). Accordingly, where the power exercised by the private individual is normally or even potentially exercisable by the state, but where the state has relinquished or abdicated that power, then private actions pursuant to that power comprise state action—that is, the "permission" of private discrimination which the state has the power to prevent. In the First Amendment area, therefore, it seems that the refusal by the state to enforce freedom of speech in forums under the potential control of the government may provide sufficient "state action" to restrict the speech abridgement activities of private individuals.

In *Marsh* v. *Alabama,* 326 U.S. 501 (1946), for example, the Court found that a private company town's discrimination involved state *in*action sufficient to invoke the Constitution:

> [*M*]*ere acquiescence* by the State in the corporation's use of its property * * * would still have been performance of a public function and discrimination would certainly have been illegal. * * * And certainly the corporation can no more deprive people of freedom of press and religion than it can discriminate against Commerce. * * * [T]he circumstance that the property rights to the premises where the deprivation of liberty * * * took place, were held by others

> than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties. * * *

Id. at 507 & n. 4, 509 (emphasis supplied). Presumably because the corporation was licensed by the state, and because the corporation performed a "public function" similar to that of any municipality, state abdication of authority comprised state action. To be sure, there was technical "state action" present in *Marsh,* in that the state was asked to enforce its trespass laws against an individual invading private property. But this element could not have been controlling. If, for example, the company had sent its corporate officers out to the town's border to prevent Marsh from setting foot on corporation property, and if Marsh instead had asked for a court injunction to restrain the officers' actions and permit his entry to the corporation's land, the result could have been no different. Compare *Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128, 130 (D. Ore. 1970) (action to compel entry to shopping center).

In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Court found that discrimination by a privately owned restaurant that had leased its facilities from the state comprised state action. Again, the Court stressed the element of *in*action as supplying a necessary link between private conduct and the Constitution:

> [I]n its lease with [the restaurant] the [State Parking] Authority *could* have affirmatively required [the restaurant] * * * to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively *abdicate* its responsibilities by either *ignoring* them or by

> merely *failing to discharge* them whatever the motive may be. * * * By its *inaction,* the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

Id. at 725 (emphasis supplied). Other cases are in accord. See, *e.g., Evans* v. *Newton,* 382 U.S. 296 (1966); *Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944).

There is, in the case before us, a clear and direct analogy. The government has "delegated" to WTOP–AM the use of valuable public property. Although Congress has exercised its power to prevent licensee censorship in other areas, stating in Section 315(a) that the "licensee shall have no power of censorship over the material broadcast under the provisions of this section," and although the exercise of this power to prevent private censorship seems clearly permissible under the Constitution, *cf. United States* v. *Price,* 383 U.S. 787 (1966); *United States* v. *Guest,* 383 U.S. 745 (1966); *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), Congress apparently has not barred various forms of licensee censorship by specific legislation. By failing clearly to prohibit licensee censorship, Congress and the Commission have thus "permitted" a form of private censorship which appears inconsistent with the First Amendment.

II. State "Enforcement" of the First Amendment

The division between state and private action is by no means distinct, for the decision to inject the restraints of the Constitution into ostensibly private actions is fundamentally one of policy. A number of commentators, therefore, at least in the Fourteenth Amendment area of racial discrimination, have argued that where important or "preferred" rights are in-

volved, the state cannot tolerate private discrimination or abridgement of those rights. Otherwise, the purposes of the Fourteenth Amendment would be thwarted. Accordingly, they have suggested that the state implicates itself in private action when it *fails affirmatively to enact* legislation barring private discrimination. See, *e.g.*, Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 73–74 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 Colum. L. Rev. 855 (1966); Henkin, *Shelley* v. *Kraemer, Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 481–85 (1962). Thus, according to this view, there is unconstitutional state action whenever the state fails to eliminate private discrimination. According to this theory, the technical requirements of "state action" may be found, via *Shelley v. Kraemer*, in any court action. The only relevant question is where to draw the line between permissible and impermissible state action—since the limitless scope of *Shelley* would apply state action to all judicial cases. According to proponents of this view, the state has the obligation to legislate against private discrimination until that legislation begins to abridge other important, countervailing individual rights, such as liberty, property, and privacy. See, *e.g.*, Black, *supra*, at 100–103. What this means, therefore, is that a state court could still enforce certain kinds of private discrimination, even though the state itself could not discriminate in such a manner. "The state court, for instance, could constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds." *Edwards* v. *Habib*, 397 F. 2d 687, 692 n. 13 (D.C. Cir. 1968) (dictum). "The state,

through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria or even from a privately owned hotel solely on account of their race." *Edwards* v. *Habib, supra,* at 693 (dictum). The point here is that in either case state action would exist; however, that action would be constitutional, or unconstitutional, depending on a balance of various important rights: liberty, property and privacy, balanced against freedom from racial discrimination.

As yet, this theory has not been frequently applied to discriminatory state action under the First Amendment. This may in part be historical accident, but it may also result from differences in the language of the First and Fourteenth Amendments. On the other hand, as the court in *Edwards* v. *Habib,* 397 F. 2d 687, 693–94 (D.C. Cir. 1968), points out, the Supreme Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964), has extended the protection of the First Amendment to the New York Times against action by a *private* individual for libel. The fact that neither Congress nor the State had made a law prohibiting libel was apparently deemed irrelevant. The Supreme Court, therefore, has found sufficient "state action" simply in a state court adjudication of the rights of two private parties.

The California Supreme Court has apparently adopted this position explicitly. *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), involved a trespass conviction of persons seeking to distribute anti-war leaflets on the property of a privately-owned railroad terminal. Citing *New York Times Co. v. Sullivan* and *Marsh v. Alabama,* the Court apparently felt that state action was inherent in its own decision, no matter what the

result, whenever it was required to resolve the competing claims of private individuals:

> If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments.

The "curtailment" of First Amendment freedoms by the State could only have been a reference to sanctions imposed *by the court* on the persons distributing the leaflets. State action, in other words, was assumed to exist in the court's decision alone. The only critical question was striking an appropriately weighted balance between speech and other freedoms. This balancing process was simplified for the court in *Hoffman* because the rights of privacy and liberty that normally inhere in property ownership were apparently "nonexistent." Once the owners of the railway terminal had "opened up" their property to the general public, they had (for profit) obviously given up any "privacy" they might otherwise have had. Although the station owners might have reclaimed their privacy by closing the terminal to the public, they could not, at the same time, open it to the public for some purposes, but exclude others on the alleged need for privacy.

Many courts and legal scholars have pointed out the need for affirmative action by the government to protect the rights guaranteed by the First Amendment. In *Associated Press* v. *United States,* 326 U.S. 1 (1945), the Supreme Court wrote:

> It would be strange indeed, however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. * * * Surely a command that the government itself shall not impede the free flow

> of ideas does not afford non-government combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. * * * Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20. And Justice Fortas has remarked, "The courts may not and must not permit either public or private action that censors the press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 420 (1967) (dissenting, joined by Warren, C. J., and Clark, J.).

In *Firstamerica & Dev. Corp.* v. *Daytona Beach News-Journal Corp.,* 196 So. 2d 97, 99 (Fla. 1966) the court observed:

> Freedom of the press was never intended to be a special privilege extended to its publishers. On the contrary, it was conceived by the writers of the Constitution and of the Bill of Rights to be a right of the people in a democracy to unrestricted information and presentation of views on government for which the press was a tailor-made medium of dissemination. Freedom of the press, therefore, is a people's personal right rather than a property right. * * *

Other courts have concurred. "Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967). "[F]reedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." *State* v. *Buchanan,* 436 P. 2d 729, 731 (Ore. 1968). "It is the right of the viewers and listeners, not the right of the broadcasters, which

is paramount." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

There is, in fact, a strong argument that Congress, through the Communications Act of 1934, enforced the First Amendment in the area of broadcasting by applying its restraints to private licensees. According to this view, Congress intended licensees to operate in the public interest, convenience and necessity, and this necessarily entailed patterns of operation consistent with First Amendment prohibitions on censorship. Indeed, at one time the Commission itself apparently adopted this view. In *United Broadcasting Co.* (*WHKD*), 10 F.C.C. 515 (1945), for example, the Commission said: "The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech," and it warned against "any type of censorship which would undertake to impose the views of the licensee on the material to be broadcast." *Id.* at 517–18. If the Communications Act does apply the First Amendment to broadcasters, then the search for state action becomes unnecessary.

Yet what has happened to that free and open "marketplace of ideas" since the founding of our country? As R. H. S. Crossman has seen, a new political, economic and social revolution "has concentrated coercive power and thought control in a few hands." Power has shifted from those who control the "means of production" to "those who control the media of mass communication and the means to destruction (propaganda and the armed forces)." R. H. S. Crossman, *The Politics of Socialism* 44 (1965). Another commentator has noted, "it is not that the mass communication industry is pushing certain ideas and rejecting others but rather that it is using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their ex-

pression." Barron, *Access to the Press—A New First Amendment Right,* 80 Harv. L. Rev. 1641, 1646 (1967). And V. O. Key has warned:

> [A]ttention to the economic aspects of the communications industries serves to emphasize the fact that they consist of commercial enterprises, not public service institutions. * * * They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence. * * * [N]ewspaper publishers are essentially people who sell white space on newsprint to advertisers. * * *

V. O. Key, *Public Opinion and American Democracy* 378–79 (1961).

The growing concentration of power over the media of communication into private corporate hands will require new concepts of "state action" if freedom of speech is to be preserved. Private corporate censorship by radio and television licensees must become a thing of the past if dissent and diversity of views in this country is to flourish. See generally *Letter to Hon. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion); Johnson, *Public Channels and Private Censors,* The Nation, March 23, 1970, p. 329. There is, therefore, a direct legal and social connection between the power of the mass media, whose owners stand like a colossus astride the channels of communications, and the state action requirement that the First Amendment's protection does not become operative until speech is abridged by a government-involved entity. *Marsh v. Alabama,* 326 U.S. 501 (1946), is perhaps the opening wedge. It holds that private corporations must not be unleashed to abridge personal freedoms at will. A. J. Berle, in commenting on

Marsh v. Alabama, has stated this important principle with great perceptivity:

> The emerging principle appears to be that the corporation * * * is as subject to constitutional limitations which limit action as is the state itself. * * * The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree. This is new as a rule of law, but it is typically American in tradition. * * * The principle is logical because * * * the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. * * * Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.

Berle, *Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power,* 100 U. Pa. L. Rev. 933, 942–43 (1952); see also, St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and 'Private' Racial Discrimination,* 59 Mich. L. Rev. 993 (1961); Miller, *The Constitutional Law of the 'Security State,'* 10 Stan. L. Rev. 620, 661–66 (1958).

There are only a limited number of ways in which a person can obtain access to the mass media of communication: (i) buy a radio or television station; (ii) buy commercial space for promotion of goods and services; (iii) develop a situation worthy of news coverage (*e.g.,* demonstrations, street marches, etc.); (iv) obtain the sympathy of an editorial staff member who

will present one's views by "proxy"; (v) obtain rebuttal time under the fairness, personal attack, or equal time doctrines; or (vi) purchase time for noncommercial speech. Yet in every case, access to the most important media of communication our century have seen is severely limited.

Thus, (i) the Commission has already taken steps to make access through ownership even more difficult than it already is. See *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants,* 35 Fed. Reg. 822 (1970); *Petitions by B.E.S.T.,* 21 F.C.C. 2d 355 (1970), *reconsideration denied,* FCC 70–738 (July 21, 1970). (ii) Commercial space for goods and services both excludes those with purely political or social speech, and abdicates the bulk of radio and television "access time" to monolithic commercial and corporate enterprises. (iii) Demonstrations and street marches soon fade in newsworthiness, and people wishing to reach the bulk of the American people must increasingly resort to the tactics of extremism to capture the largess of the television eye. (iv) The sympathy of a radio or television station's editorial staff is often difficult to obtain, and is perhaps nonexistent in those communities with few radio or television outlets. And (v), the Commission has been reluctant to apply the fairness doctrine evenhandedly to those with minority or dissenting views. See, *e.g., Letter to Mr. Donald A. Jelinek,* FCC 70–595 (June 4, 1970) (anti-military recruitment announcements); *Letter to Mrs. Dorothy Healey,* FCC 70–658 (June 24, 1970) (attack on member of Communist Party for "unpatriotic" views).

Only (vi), therefore, the ability to purchase time at going commercial rates, can offer many Americans any opportunity for electronic speech. Although the First Amendment was not enacted to sanctify the

views held by the corporate owners of the mass media, government inattention and failure to "enforce" the First Amendment has had that effect. Accordingly, "non-commercial access" may be required under the First Amendment to preserve or create a true "marketplace of ideas" in the electronic media. Both commentators and courts have recognized this proposition. See, *e.g.*, Silver, *Free Speech on Private Property*, 19 Cleveland State L. Rev. 372 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 (1969); Horning, *The First Amendment Right to a Public Forum*, 1969 Duke L. Rev. 931; Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1644–50 (1967); Gorlick, *Right to a Forum*, 71 Dick. L. Rev. 273 (1967); Note, *The Listener's Right to Hear in Broadcasting*, 22 Stan. L. Rev. 863 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 304 (1969).

I conclude, therefore, from the foregoing discussion, that BEM's advertisements are constitutionally protected speech under the First Amendment, and that WTOP–AM's action in refusing that proffered speech is sufficiently involved with the state to invoke the restraints of the Constitution. I have engaged in this detailed treatment of "state action" for one principal reason: to lay conclusively to rest any argument that licensees have the freedom to censor at will, unrestrained by the First Amendment. They do not. Radio and television licensees, when they act vis-a-vis the people, must be treated, for purposes of the Constitution, as if they were agents of the government. Broadcast licensees have no more absolute right to impose bans on speech over their facilities than do groundskeepers in public parks. In all cases involving

demands for "access" to the mass media, the only question is whether the broadcaster's restrictions and limitations are *reasonable*. A licensee may obviously impose reasonable "time, place and manner" restrictions upon the use of his facility; but he can no more absolutely ban certain kinds of speech or types of speakers than the government can ban citizens from public parks and streets. *Cf. Hague v. CIO,* 307 U.S. 296 (1939).

III. THE "APPROPRIATENESS" OF THE SPEECH IN THE PARTICULAR FORUM

Over the past few years, the courts have dealt with a number of cases in which persons wished to exercise speech freedoms in conjunction with public or private property—for example, public streets and parks, train stations, bus terminals, schools, and so forth. In most of these cases, the court has first established the existence of state action (or disposed of it as unimportant). Then, the court has asked two types of questions: first, is the property in issue an appropriate forum for the communication of views; and second, has the person owning or controlling that forum "discriminated" between individuals or particular views in a manner which is inconsistent with the Constitution. The answer to the first question normally depends on whether the property has "traditionally" been used as a forum for communication, as in *Hague* v. *CIO, supra,* or whether the property has been "opened up" to the general public in such a manner that speech on that property would be a normal activity. The answer to the second question has generally turned on whether the property owner's restrictions on speech are "reasonable," and this in turn depends on whether the speech interferes with any important property right (such as privacy, exclusive possession, freedom from inter-

ference or obstruction, etc.) which is *worth preserving.* As stated in *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), the courts will not curtail First Amendment freedoms "to protect an interest that is *nonexistent.* * * *" *Id.* at 356 (emphasis supplied).

The doctrines evolved by the courts are contained in the following proposition: When private property, which is an appropriate forum for communication, is "opened up" to general use by the public, then the "private" owner of that property "waives" his traditional property rights to privacy and exclusivity of use, and cannot abridge the speech rights of individuals seeking to use his "forum" for the expression of views. Under certain circumstances (although perhaps not in the broadcast area), the private owner may entirely close his property to the public; but, if he opens it at all, he demonstrates that he has no real property interest of "privacy," and he cannot therefore close it selectively to specific persons or particular views.

A. Existence of a "Forum"

In *Marsh* v. *Alabama,* 326 U.S. 501 (1946), a person seeking to distribute religious literature on the streets of a privately owned "company town" was prosecuted for trespass at the instance of the company owners. The Court reversed, finding that the privately owned town in fact performed a "public function" similar to that of any town, whether private or publicly owned, and stated:

> Ownership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. * * *

> * * * Whether a corporation or a municipality owns or possesses the town, the public in either case has an identical interest in the functioning of the community in such a manner as the channels of communication remain free.

Id. at 506, 507. Although the Court felt the private corporation could entirely "close the sidewalk" to the public, *Marsh* v. *Alabama, supra* at 505 n. 2, the corporation could not "discriminate" against certain religious views once it had generally opened the sidewalk up to the public. *Id.* at 507.

Many other cases have followed the doctrine of *Marsh* v. *Alabama,* holding that in certain circumstances private property "may, at least for First Amendment purposes, be treated as though it were publicly held." *Amalgamted Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 316 (1968). See, *e.g., Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969); *In re Lane,* 457 P. 2d 561 (Cal. 1969); *In re Hoffman,* 434 P. 2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964); *Amalgamated Cloth. Wkrs.* v. *Wonderland Shop. Ctr.,* 122 N.W. 785 (Mich. 1963) (affirmance by equally divided court). For other cases in which the court found the existence of a "public forum" for communication of views, see *e.g., Tinker* v. *Des Moines School Dist.,* 393 U.S. 503 (1969) (public school); *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2d Cir. 1968) (bus terminal); *Zucker* v. *Panitz,* 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); *Wirta* v. *Alameda-Contra Costa Transit District,* 343 P. 2d 982 (Cal. 1967)

(public busses); *Danskin* v. *San Diego Unified School Dist.*, 171 P. 2d 885 (1946) (public school buildings); *People* v. *St. Clair*, 56 Misc. 2d 326, 288 N.Y.S. 2d 388 (Crim. Ct. 1968) (public subway platform).

In sum, these cases all stand for the proposition that where property, publicly or privately owned, is "opened up" for general use by the public, whether or not that use directly involves speech activities, then the facility cannot be closed to speech unless its exercise directly and substantially interferes with the facility's primary use—for example, as a shopping center, bus station, railway terminal, subway, or school.

In the case before us involving WTOP-AM's rejection of BEM's advertisements, there seems little question that the frequency controlled by WTOP-AM is a "forum" for the communication of ideas. Indeed, that appears to be its exclusive purpose, whether those ideas be political, commercial or entertainment. And there is also no question that WTOP-AM has "opened up" the use of that frequency to the general public—by making *commercial* advertising time available to the general public on a first-come, pay-as-you-go basis. See, *e.g.*, *Kissinger* v. *New York City Transit Authority, supra; Zucker* v. *Panitz, supra; Hillside Community Church, Inc.* v. *City of Tacoma, supra;* and *Wirta* v. *Alameda-Contra Costa Transit District, supra,* all cases in which the owner of private or public property opened up his facility for the display of private commercial advertisements. In each case, the court found that a "public forum" for the communication of views was present. Whether or not WTOP-AM's opening of its forum for the communication of private commercial views constitutes an "opening up" for non-commercial (but also paid) views, will be considered below.

B. "Reasonable" Use of Forum

Every licensee must retain some power to reject programming—if only when it fails to meet certain quality standards, or violates federal law (lotteries, obscenity, etc.). But just as clearly the licensee, as a trustee for the public, does not possess unlimited power to monopolize the use of the airwaves. The essential question, therefore, is whether the use of advertising "space" or the broadcast spectrum by BEM is "reasonable" and consistent with other uses of that spectrum by the licensee.

The Commission and the courts must begin to draw guidelines for "reasonable" access to the broadcast frequencies, seeking to ensure that the electronic media of twentieth century communication are as open to the public as the soap boxes, public parks, and town hall meetings of the last century. *Cf.* Kalven, Jr., *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 21–32. On the one hand, "[t]he rights of free speech * * * do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1964) (Goldberg, J.). But on the other hand, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 390 (1969).

The FCC and the courts have already begun to develop variants of the access doctrines latent in *Red Lion*. The fairness, personal attack, and equal time doctrines all curtail the licensee's discretion to reject programming. So does the requirement that the licensee ascertain community needs and interests and devote "some significant proportion of [its] * * *

programming" to them. *City of Camden,* 18 F.C.C. 2d 412, 421 (1969). In light of the "state action" discussion above there may well be limits on the ability of a licensee to censor out of a prepared program, during broadcast, the remarks of an invited guest. See *Letter to Cong. Richard L. Ottinger* [*Judy Collins incident*], FCC Public Notice No. 47876, April 20, 1970 (dissenting opinion). In the case here before us, BEM is willing to pay the "going commercial rate" to gain access to WTOP-AM's facilities. Therefore, unlike fairness doctrine cases, a requirement of access imposed on WTOP-AM with respect to this anti-war announcement *would impose no financial burden on the station.* This is an extremely important point. Compare *Letter to Mr. Donald A. Jelinek,* FCC 70-595, (June 4, 1970) (dissenting opinion at pp. 21-22) (free public service announcements would impose no financial burden on licensee). So long as the party seeking access to a broadcast facility is willing to pay the going rate, we need not face the equal protection question posed by persons financially unable to pay for their "privilege" of electronic speech.

The state and federal courts have, during the past few years, addressed precisely the same question before this Commission—although in the somewhat different context of *spacial* forums (parks, streets, train terminals, etc.), and not *electronic* forums. In every case involving persons who sought only to use the advertising facilities provided to commercial advertisers, the courts decisively ruled that the owner of the property in question could not admit commercial advertisements and exclude political ones.

The germinal case in this area was decided by the California Supreme Court in 1967. In *Wirta* v. *Alameda-Contra Costa Transit Dist.,* 434 P. 2d 982 (Cal. 1967), the members of Women for Peace

brought suit against a public Transit District, operating the municipal bus service, and a private advertising company which serviced the Transit District's buses. The buses contained advertising space above the passengers' seats, and the Transit District leased that space to the advertising company which, in turn, re-leased it to private commercial advertisers. (The parallel with FCC licensing of public property to private licensees who re-lease that frequency space to commercial advertisers is obvious.) In 1964, Women for Peace requested that it be allowed to place the following advertisement in defendants' coaches, at the standard rate:

> "Mankind must put an end to war or war will put an end to mankind."
>
> President John F. Kennedy.
>
> Write to President Johnson: Negotiate Vietnam.
>
> Women for Peace
> P. O. Box 944, Berkeley."

Defendants refused to accept the advertisement, on the ground that the advertisement conflicted with the District's advertising policy:

> The * * * District * * * accepts only commercial advertising for the sale of goods and services, except that political advertising will be accepted in connection with and at the time of a duly called election being held within the boundarys of the District, and further subject to the conditions that * * * space be made equally available to opposing candidates or sides of a ballot measure.

The advertisement in question was rejected on the ground that "controversial subjects" were not consistent with this policy. (Again, the parallels with WTOP–AM's policy, as well as the Commission's equal time doctrine, are obvious.)

The court first asserted that the content of the advertisement was "undeniably protected by the First Amendment," despite its status as a paid message. 434 P. 2d at 984. It then observed that the advertisements in question could not conceivably interfere with the District's primary function of providing transportation. 434 P. 2d at 985. And the court then defined the problem as one "in which a governmental agency [the parallel to WTOP–AM has been made in the previous section] has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." 434 P. 2d at 985. The court concluded:

> [D]efendants, *having opened a forum* for the expression of ideas by providing facilities for advertisements on its buses, *cannot* for reasons of administrative convenience decline to accept advertisements expressing opinions and beliefs within the ambit of First Amendment protection.

434 P. 2d at 985 (emphasis supplied). The "vice" of the district's censorship lay in choosing "between classes of ideas * * *, sanctioning the expression of only those selected, and banning all others." This the court described as "a most pervasive form of censorship." 434 P. 2d at 986.

The court also expressed itself with absolute bluntness on the perversity of elevating commercial speech to a status more important than political speech. "[I]n the totality of man's communicable knowledge," the court said, "that which bears no relationship to material value preponderates." 434 P. 2d at 986. The court observed:

> A cigarette company is permitted to advertise the desirability of smoking its brand, but

> a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes.

434 P. 2d at 986–87.

Finally, the court relied upon a companion case, *In re Hoffman,* 434 P. 2d 353 (Cal. 1967), to state the controlling issue before it: "the test is not whether petitioners' use of the station was a railway use, but whether it *interfered* with that use." 434 P. 2d at 356 (emphasis supplied). Because the bus company was unable to show that presentation of political commercials interfered with *any* legitimate function of its transportation function, its refusal to accept political advertising was impermissible.

The analogies to WTOP–AM are almost exact. WTOP–AM is, for purposes of the First Amendment, an "agent" of the state—just as was the private advertising agency leasing "public property" from the transit authority. WTOP–AM rejected BEM's advertisement, also on the ground that it accepted only "commercial" advertising. There was no evidence that acceptance of the advertisement would "interfere" with WTOP–AM's normal function of presenting advertising space to sponsors and entertainment programming to listeners. One must conclude, therefore, that WTOP–AM cannot reject BEM's advertisements any more than the transit authority could reject those of the Women for Peace.

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In *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 328 (S.D.N.Y. 1967), the court reached precisely the same result as in *Wirta*, and for identical reasons. There too an anti-war group wanted to place an advertisement on the walls of the subway; a private advertising corporation, operating under contract to the city, refused, due to the "controversial" nature of the views expressed.

The Transit Authority made two arguments. First, they argued that they only accepted commercial advertisements, public service announcements, and political advertising during election—and that acceptance of these was not a generalized waiver to include political advertisements. The Court quickly rejected this argument, stating that the Authority and the Advertising Company "cannot accept some posters and refuse the plaintiffs' for reasons that conflict with the First Amendment guarantee of the right to freedom of speech." 274 F. Supp. at 442. Second, the Transit Authority argued that the posters were inflammatory, would be displayed to a "captive audience," and might cause disorder and irritation. Again the court swiftly disposed of this argument. Citing *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949), the court said:

> [A] function of free speech * * * is to invite dispute * * *. Speech is often provocative and challenging. It may * * * have profound unsettling effects. * * * That is why freedom of speech is * * * protected against censorship * * *.

The parallel with the case involving WTOP–AM again is obvious.

In *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), a group of high school students brought an action for declaratory and injunctive relief to compel

a high school newspaper to accept a paid advertisement in opposition to the Vietnam war. The defendant school authority argued that the paper's policy was to accept "only purely commercial advertising" and to reject all advertising (even in support of student government nominees) which was politically oriented. Citing *Wirta,* the court ruled in the plaintiff's favor:

> Here, the school paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor. It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas.

299 F. Supp. at 105. The court could see no disruption of the newspaper's normal function that could conceivably result from the antiwar advertisements.

Finally, in *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P. 2d 350 (Wash. 1969), a church group sought to place "end the war in Vietnam" posters on transit buses operated by the city of Tacoma, Washington, where advertising space was under the control of a private lessee advertising agency. Citing *Wirta* and *Kissinger,* the court ruled that "[o]nce a municipality or public body enters the field of advertising, therefore, the law requires that a showing of a 'clear and present' danger must be made in order to limit such advertising without conflicting with guarantees of freedom of speech under the First and Fourteenth Amendments." 455 P. 2d at 354. The court found the rejection to be "clear acts of censorship" in violation of plaintiff's first amendment rights.

The licensee has argued that subjects of the type contained in the BEM advertisements "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." It seeks to use

this pathetically weak justification to overcome the Supreme Court's "clear and present danger" test, see *Hillside, supra,* and the First Amendment to the Constitution. This reasoning must be rejected out of hand. Once WTOP–AM has opened its forum up to 10, 20, 30, and 60 second commercial spots, it cannot withhold similar time periods from persons seeking to fill them with political speech. It borders on arrogance for WTOP–AM to assert that $4–5,000 automobiles which pollute the air and endanger human life may be sold to an unsuspecting public in 30 second spot announcements, but that the simple message, "End the War in Vietnam," cannot be communicated in a short announcement. Neither the government, nor a licensee, must be permitted to arrogate to itself the totalitarian role of deciding, *for the people wishing to speak,* how they will be permitted to present their thoughts. Similarly harsh and unjustifiable restrictions have been struck down in many other related cases, and I need not detail their reasoning here. See *e.g., Wolen* v. *Port of New York Authority,* 392 F. 2d 83 (2d Cir. 1968); *Tanner* v. *Lloyd Corp.,* 308 F. Supp. 128 (D. Ore. 1970); *In re Lane,* 457 P. 2d 561 (Cal. 1969); *People* v. *St. Clair,* 288 N.Y.S. 2d 388 (Crim. Ct. 1968); *In re Hoffman,* 434 P. 2d 353 (Cal. 1967); *Schwartz-Torrance Inv. Corp.* v. *Bakery & Con. Wkrs. U.,* 394 P. 2d 921 (Cal. 1964).

The argument has been made that if WTOP–AM is forced to accept political advertisements, then commercial space will become limited. These arguments have also been considered by the courts, and summarily rejected. In *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 328 (S.D.N.Y. 1967), the court remarked:

> Defendants also argue that if they accept the posters for display, they will have to accept

> other posters relating to [political issues] * * * with the result that commercial advertising will become curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted. * * * [T]he Authority and the Advertising Company could impose reasonable regulations on the display of plaintiffs' posters and others of a similar nature as to the number to be displayed and the time and place for their display.

See also, *Farmer* v. *Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964); *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 434 P. 2d 982 (Cal. 1967). Access to WTOP-AM's facilities for a "reasonable" number of political advertisements need not open the floodgates to a limitless political battleground—although in many respects this might be preferable to the existing commercial wasteland we see spread out before us today. Nothing would prevent the licensee or the Commission from adopting "reasonable" limitations on the number of both commercial and political advertisements to be broadcast.

Perhaps not surprisingly, the Commission has adopted precisely such an approach in prior cases. In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), for example, a labor union filed a complaint against a licensee for refusing to sell the union time to solicit memberships and discuss controversial subjects (such as "race, religion, and politics"). The Commission designated the station's license renewal for hearing to determine "*the duties* of a licensee * * * to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of

memberships for nonprofit organizations." *Id.* at 517 (emphasis supplied). During the hearing, it developed that the station's policies were governed by the Code of the National Association of Broadcasters. The Code provided that "no time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts * * * and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations, such as the American Red Cross. * * *" *Id.* at 516. Following the hearing, both parties filed a joint motion, stating that the licensee had adopted a new policy, and asking for dismissal of the proceedings. The new policy stated, in pertinent part:

> (a) * * * Station WHKC [will] * * * consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
>
> (b) Requests * * * will * * * be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule. * * *
>
> (c) Station WHKC will make time available, primarily on a sustaining basis, *but also on a commercial basis,* for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof. * * * [T]here will be *no discrimination between business concerns and nonprofit organizations.* * * * Nonprofit organizations will have the right to purchase time for solicitation of memberships.
>
> * * * * *
>
> (e) The censorship of scripts is an evil repugnant to the American tradition of free

> speech and a free press, whether enforced by a Government agency or by a private radio station licensee. * * * Station WHKC will not censor scripts, or delete any matter contained in them. * * *
>
> (f) The station will see that its broadcasts on controversial issues * * * maintain a fair balance among the various points of view * * *, both sustaining and commercial alike.
>
> The parties believe that the above statement of policy properly sets forth *the duties* of a licensee under the Communications Act of 1934. * * *

United Broadcasting Co. (WHKC), supra at 516–17 (emphasis supplied).

The Commission, on the basis of this newly adopted policy statement, dismissed the proceedings. Stating that the policy was "fair and nondiscriminatory," *id.* at 518, we said:

> The Commission * * * is of the opinion that the operation of any station under the *extreme principles that no time shall be sold for the discussion of controversial public issues* and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations. * * * The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a *strict rule against the sale of time for any programs of the type mentioned.*

Id. at 518 (emphasis supplied).

The point is simply that the Commission has previously ruled that this policy comports with the *"duties"* of a licensee, and that refusals to sell time for the discussion of controversial issues of public importance would violate the 1934 Communications Act. The Commission clearly stated that a "strict rule" against the sale of such time would be "extreme," and that "competent management" should be able to preserve balance and fairness between applicants. BEM asks for no more here. That this Commission has retrogressed in the 25 years since its *WHKC* opinion is a sad commentary indeed.

IV. SECTION 3(H) AND "COMMON CARRIERS"

Section 3(h) of the 1934 Communications Act provides, in rather uninformative fashion:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy * * *; *but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.*

47 U.S.C. 153(h) (1964) (emphasis supplied). The majority has seized upon this general language to argue that a licensee has the power categorically to reject *all* requests by politically-oriented groups to purchase time. According to the majority, "[i]f the licensee were deemed to be a common carrier, . . . the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." There are a number of reasons why this argument is faulty.

First, it is interesting to note that the Commission itself has rejected this argument in prior cases. In *United Broadcasting Co.* (*WHKC*), 10 F.C.C. 515 (1945), for example, discussed above, the Commission clearly stated that Section 3(h) of the Act in no way interfered with the "duty" of licensees to make a reasonable amount of time available for purchase or on a sustaining basis to persons wishing to discuss issues of controversy and public importance:

> It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community *and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* The spirit of the Communications Act of 1934 requires radio to be an instrument of free speech, subject only to the general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest.

Id. at 517–18 (emphasis supplied).

Second, it seems clear, at least from the cited passage, that Section 3(h), whatever its function, was not designed to permit licensee flatly to reject advertisements for non-commercial or controversial causes. It seems likely that Congress, in enacting Section 3(h), intended only to make the rather detailed and com-

plicated "Common Carrier" provisions in Title II of the 1934 Act inapplicable to broadcasting. A right of reasonable access, sought here by BEM, would certainly be consistent with the principles enunciated in *United Broadcasting Co. (WHKC), supra,* without involving Title II of the Act. Obviously, even under the access principles sought by BEM a licensee would not be forced to take *everyone* who sought air time. After all, a licensee may not have enough airtime or frequency space available to accommodate all those wishing to advertise. But it does not follow, either, that a licensee can *exclude* everyone who seeks access. There are many ways of permitting reasonable access by non-commercial advertisers without having to accept them all. Licensees, for example, might decide to accept 50% commercial and 50% non-commercial advertising. In each category, some might be turned away—for any number of reasons. But the broadcaster would still be obliged to maintain an adequate "balance" between viewpoints for purposes of the fairness doctrine. And we have already ruled that "competent management should be able to meet such problems in the public interest." *United Broadcasting Co. (WHKC)*, 10 F.C.C. 515, 518 (1945). This principle was underscored by the court in *Office of Communication of United Church of Christ v. FCC,* 359 F. 2d 994 (D.C. Cir. 1966), when it said:

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.

Id. at 1003.

A third defect in the majority's reasoning is that the Commission itself has, on several occasions, lim-

ited the discretion of licensees to accept or reject persons wishing to use their facility to express views. *In Letter to Nicholas Zapple,* FCC 70–598 (1970), for example, we ruled that when a spokesman for a political candidate appears in support of that candidate over a radio or television station, then, even though the equal time requirements of Section 315(a) of the Communications Act are inapplicable, the licensee *must* nevertheless give equal opportunties to supporters of the opposing candidate. Such opposing supporters would not only be the "appropriate" and "logical" persons to reply, but as we stated, "it would not be reasonable" for a licensee to refuse such a spokesman time. In 1968, on another occasion, we stated that under certain circumstances the fairness doctrine would require a licensee to put on one particular person—where "[t]here is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." *Memorandum Opinion and Order,* 12 F.C.C. 2d 250, 252–53 (1968).

The point is simply that these requirements do not violate Section 3(h) of the Act, even if they do require a licensee to accept the programming offered by a specific person. A system of reasonable access is perfectly consistent with Section 3(h) of the Act. Not only that, it is *required* by the First Amendment under the principles described above. The principles and policies of the First Amendment do not dictate the amount of non-commercial advertising licensees must accept. They require only that licensees must accept *some* non-commercial advertising, and that the amount accepted must be *reasonable.*

CONCLUSION

In sum, BEM's advertisements are protected speech under the First Amendment; WTOP-AM's actions in rejecting the advertisements subject it, under concepts of state action, to the restraints and policies of that Amendment; WTOP-AM has presented no reasonable justification for its discrimination between commercial and non-commercial advertising; and Section 3(h) of the Communications Act is perfectly consistent with procedures permitting a right of reasonable access to the broadcasting media for political advertisements.

Accordingly, I would grant the petitioners' request and enforce their demand for access to the public facilities guarded so zealously by the licensee. This the majority has refused to do. I dissent.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

[Filed Aug. 3, 1971, Nathan J. Paulson, Clerk]

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC., INTERVENOR

[Filed Oct. 22, 1971, Nathan J. Paulson, Clerk]

No. 24537

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., INTERVENOR

COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

September Term, 1970

Petitions for Review of Orders of the Federal Communications Commission

Before: WRIGHT, McGOWAN and ROBINSON, Circuit Judges

JUDGMENT

These cases came on to be heard on the records from the Federal Communications Commission, and were argued by counsel. On consideration thereof, it is

Ordered and adjudged by this Court that the orders of the Federal Communications Commission on review herein are hereby reversed and the cases are remanded to the Fedeal Communications Commission for further proceedings in accordance with the opinion of the Court filed this date.

A true copy:
Test: NATHAN J. PAULSON, Clerk, United States Court of Appeals for the District of Columbia Circuit.
By: Dorothy E. Long, Deputy Clerk.

Per Curiam.
For the Court:
NATHAN J. PAULSON,
Clerk.

Dated: August 3, 1971.
Opinion by Circuit Judge Wright.
Separate dissenting opinion by Circuit Judge McGowan.
Reissued: October 29, 1971.

NATHAN J. PAULSON,
Clerk, U.S. Court of Appeals
for the District of Columbia Circuit.

APPENDIX E

United States Court of Appeals, for the District of Columbia Circuit

No. 24492

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, PETITIONER

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

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AMERICAN BROADCASTING CO., INC., INTERVENOR

COLUMBIA BROADCASTING SYSTEM, INC., INTERVENOR

September Term, 1971

Before WRIGHT, MCGOWAN, and ROBINSON, Circuit Judges

ORDER

On consideration of the petitions for rehearing filed by Post-Newsweek Stations, Capital Area, Inc., American Broadcasting Companies, Inc., the United States of America and Federal Communications Com-

mission, and Columbia Broadcasting System, Inc. for rehearing, and of the brief of *amicus curiae* National Broadcasting Company, Inc. in support of the petitions for rehearing, it is

Ordered by the Court that the aforesaid petitions for rehearing are denied.

Per Curiam.

U.S. GOVERNMENT PRINTING OFFICE: 1971